to a specific classification, lower courts are left to decide how to adjudicate constitutional challenges.

Transgender classifications currently stand in this limbo. While the Supreme Court held in *Bostock v. Clayton County* that, under Title VII, transgender discrimination constitutes discrimination on the basis of sex, the Court has not addressed a *constitutional* challenge to transgender discrimination.[51] The circuits that have adjudicated equal protection challenges to transgender classifications have justified applying intermediate scrutiny[52] to transgender classifications either by finding that transgender classifications are quasi-suspect[53] or by analogizing classifications based on transgender status to classifications based on gender or sex.[54]

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[51] *See* 140 S.Ct. 1731, 1741 (2020). Title VII is not coterminous with the Equal Protection Clause. *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008–2009 CATE SUP. CT. L. REV. 53, 53 (2009). However, the Court's decision in *Bostock*, compounded with the more specific decisions of circuit courts to review transgender-status discrimination like gender discrimination, supports the inference that a future transgender-status challenge reviewed by the Supreme Court would be reviewed under intermediate scrutiny.

[52] Existing Supreme Court precedent does not support the potential application of strict scrutiny to transgender classifications. *See Karnoski*, 926 F.3d at 1199. Thus, the only debate concerns whether rational basis or intermediate scrutiny will be applied.

[53] *See* Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020).

[54] *See* Smith v. City of Salem, 376 F.3d 566 (6th Cir. 2004); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017); Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019); Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022).

The remainder of this Part will survey those circuit court decisions. It will show that, under either rationale, a state regulation creating a third-gender category in elite sport would be reviewed under intermediate scrutiny.

i. Transgender Classifications as a Quasi-Suspect Class

In *United States v. Virginia*, Justice Ginsburg explained that sex classifications are only "quasi-suspect" because of inherent physiological differences between males and females.[55] The Fourth Circuit extended that principle to transgender classifications in *Grimm v. Gloucester County School Board*,[56] where it applied a four-factor suspect class test[57] considering: 1) whether the class has been historically subject to discrimination; 2) whether the class has a defining characteristic that impacts its ability to contribute to society; 3) whether the class can be defined as a discrete group based on immutable characteristics; and 4) whether the class is a minority lacking political power.[58] After analyzing each factor, the Fourth Circuit found that transgender

[55] United States v. Virginia, 518 U.S. 513, 534 (1996).

[56] 972 F.3d 586, 611 (4th Cir. 2020). The Fourth Circuit also would have subjected the policy at issue to intermediate scrutiny because Grimm was subjected to sex discrimination when he failed to conform to the sex stereotype promulgated by his school's bathroom policy. *Id.* at 608. For a more detailed analysis as to why transgender classifications are quasi-suspect, see Barry et al., *supra* note 41, at 551–567.

[57] This test is not universally adopted. As mentioned above, courts are inconsistent in their methodology when determining "suspectness." However, courts frequently use some combination of these factors in determining whether a class is suspect or not. *See* Strauss, *supra* note 42, at 146.

[58] *Grimm*, 972 F.3d at 611.

individuals constitute a quasi-suspect class.[59] If the Supreme Court similarly applied this four-factor test, any classification based on transgender status would receive intermediate scrutiny without an inquiry into the substance of the regulation.

ii. Transgender Status as a Classification on the Basis of Sex

Even if transgender classifications are not deemed "quasi-suspect," the Supreme Court would apply intermediate scrutiny if the transgender classification regulated based on sex.[60] In doing so, the Court may rely on one of the two, non-exclusive rationales used by the lower courts to determine that transgender classifications regulate based on sex. First, if transgender classifications facially discriminate on the basis of sex, they will receive intermediate scrutiny review. Second, the lower courts have applied intermediate scrutiny to transgender classifications because they constitute gender-based stereotyping under the Supreme Court's *Price Waterhouse v. Hopkins* precedent.[61] Whether a court determines transgender classifications are facially

[59] First, based on evidence provided by amici, the Fourth Circuit found that "[d]iscrimination against transgender people takes many forms." *Id.* Second, "being transgender bears no such relation" to the ability to contribute to society. *Id.* at 612. Third, "being transgender is not a choice." *Id.* And lastly, transgender people make up less than a tenth of a percent of the United States adult population and are underrepresented in every branch of government. *Id.* at 613.

[60] *See supra* note 51 and accompanying text.

[61] *See* 490 U.S. 228, 251 (1989) (holding gender stereotyping in employment decisions is sex-based discrimination under Title VII). *See also* Craig v. Boren, 429 U.S. 190, 212 n.5 (1976) (Stevens, J., concurring).

discriminatory against transgender individuals or inherently gender stereotyping (or both), intermediate scrutiny applies.

1. Facially Discriminatory Policies

Where policies facially regulate transgender status, circuit courts have applied heightened scrutiny. In *Karnoski v. Trump*, the Ninth Circuit held that a policy barring transgender individuals from serving in the military due to "gender dysphoria" facially regulates transgender status and must be subject to an intermediate standard of review.[62] Most recently in *Brandt v. Rutledge*, the Eighth Circuit held that a policy prohibiting medical professionals from providing gender-affirming care to minors discriminates on the basis of sex "because a minor's sex at birth determines whether or not the minor can receive certain types of medical care under the law."[63] Thus, heightened scrutiny must be applied.[64]

2. Gender Stereotyping

Three circuits have applied intermediate scrutiny to transgender classifications because they constitute gender stereotyping. The Sixth Circuit was the first to apply gender-stereotyping reasoning to transgender classifications, holding in *Smith v. City of Salem* that employment discrimination based on gender non-conformity assumes certain traits are innately associated with one gender and not the other, constituting discrimination based on gender stereotype and requiring

[62] Karnoski v. Trump, 926 F.3d 1180, 1199–1201 (9th Cir. 2019).

[63] Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022). *See also* Barry, et al., *supra* note 41, at 569–70.

[64] *Brant*, 47 F.4th at 670.

review under heightened scrutiny.[65] Both the Eleventh and Seventh Circuits relied on the Sixth Circuit's reasoning in *Smith* and the Supreme Court's decision in *Price Waterhouse* to justify applying heightened scrutiny to transgender classifications as discrimination based on gender stereotyping.[66] In *Glenn v. Brumby*, the Eleventh Circuit held that, because transgender individuals inherently do not conform to the stereotypes of their sex assigned at birth, discrimination based on gender non-conformity is discrimination based on gender-based behavioral norms.[67] The Seventh Circuit followed suit in *Whitaker v. Kenosha Unified School District*,[68] affirming a preliminary injunction allowing the plaintiff, a transgender male, to use the school bathroom correlating to his gender identity because "the School District's policy cannot be stated without referencing sex. . . . This policy is inherently based upon a sex classification and heightened scrutiny applies."[69]

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[65] *Smith*, 376 F.3d at 576 ("Individuals have a right, protected by the Equal Protection clause of the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment.").

[66] For a more detailed discussion on how transgender classifications are grounded in sex stereotypes, see Barry et al., *supra* note 41, at 568–69.

[67] Glenn v. Brumby, 663 F.3d 1312, 1316–17, 1319 (11th Cir. 2011).

[68] "By definition, a transgender individual does not conform to the sex-based stereotypes that he or she was assigned at birth." Whitaker v. Kenosha Unified School District, 858 F.3d 1034, 1048 (7th Cir. 2017).

[69] *Id.* at 1051. The District of Idaho has also held statutes regulating transwomen participation in sports to be facially discriminatory, thus warranting heightened scrutiny, because these statutes "discriminate[] between cisgender athletes, who may compete on athletic teams consistent with

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These decisions neatly justify why a constitutional challenge to a state policy requiring a third-gender category in elite sports would require intermediate scrutiny. A policy like World Aquatics's inherently regulates on the basis of sex because the implementing state would have to dictate which characteristics count as "female" for a female competitor and "male" for a male competitor. Thus, distinctions are made based on an athlete's sex at birth. Additionally, this delineation promotes a state-sponsored ideal of what is required of someone to be "female" or "male" to compete in those respective categories, thereby associating certain innate characteristics with one gender but not the other. This is gender-stereotyping, which requires heightened review.

Regardless of which rationale prevails, it seems likely that the Supreme Court will follow the consensus of the circuits and apply intermediate scrutiny to transgender classifications.[70] Thus, a third-gender category challenged under the Equal Protection Clause would be reviewed under this framework. The following Section details the next step of the equal protection analysis: applying intermediate scrutiny.

c. Intermediate Scrutiny Applied

The remainder of the equal protection inquiry is inherently fact specific. Under intermediate scrutiny, the government must show "at least the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially

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their gender identity, and transwomen athletes, who may not compete on athletic teams consistent with their gender identity." Hecox v. Little, 479 F. Supp. 3d 930, 975 (D. Idaho 2020).

[70] *See supra* note 51 and accompanying text.

related to the achievements of those objectives."[71] The government's justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation."[72] Thus, a court must first consider the veracity of the proffered governmental interest before assessing whether the statutory framework is substantially related to that interest.[73]

This section will evaluate the salience of two important interests that World Aquatics offered to justify its third-gender category: first, protecting the safety of cisgender female athletes (the "safety rationale"); and, second, protecting the integrity of women's sports (the "fairness

[71] United States v. Virginia, 518 U.S. 515, 533 (1996). *See also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 439 U.S. 190, 197 (1976); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).

[72] *Virginia*, 518 U.S. at 533.

[73] There are limitations on an equal protection challenge. When bringing a challenge, a litigant can allege the statute is facially unconstitutional or unconstitutional as applied. A facial attack, which is strongly disfavored by the law, is only successful where any application of the statute would be unconstitutional. *See* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL OF RIGHTS J. 657, 657–58 (2010). A litigant alleges an as-applied challenge when a statute, even if generally constitutional, is unconstitutional when applied to the litigant because of the litigant's circumstances. *Id.* at 657. The outcome of a third-gender-category challenge will likely depend upon whether a litigant brings a facial or as-applied challenge because sports-specific characteristics may make certain government interests more salient in one sport than others. *See infra* Part III.c.i.

rationale").[74] Before discussing the merits of both the safety and fairness rationales, it is important to recognize the limits upon the regulatory scope of a third-gender category like World Aquatics's. While elite sport has been left largely privatized and unregulated by state or federal involvement,[75] recently, the issue of transwomen participation has sparked legislation from some states within the interscholastic arena.[76] Even the U.S. House of Representatives is currently considering a bill that would restrict the ability of transgender athletes to compete according to their gender identity.[77] States regulating transgender athlete participation at the scholastic level have largely done so under the guise of "fairness" for women's sport competition.[78] The state interest in regulating state-sponsored public-school activity is much stronger than any state interest in regulating mostly-privately-run elite sporting activities. It will be helpful to compare arguments made in cases challenging state regulation of transgender individuals in the scholastic context. However, it is

[74] I rely on the interests put forth by World Aquatics because no state has adopted a third-gender category mandate yet. These rationales do mirror those used by states to justify regulating scholastic sport gender classifications. *See supra* note 15.

[75] *See* 36 U.S.C. § 2205.

[76] *See supra* note 15 and accompanying text.

[77] *See* H.R. 734, 118th Cong. (1st Sess. 2023).

[78] For example, Idaho's currently-enjoined transgender participation ban is entitled the "Fairness in Women's Sports Act." IDAHO CODE § 33-6203 (2020).

crucial to recognize that under intermediate scrutiny the state must offer an important interest in regulating *elite sport* specifically.[79]

i. Safety Rationale

Any state argument that relegating transwomen athletes to a third category protects the safety of cisgender female athletes is grounded in the assumption that transgender women have an innate physical advantage that will endanger cisgender women.[80] While scientific studies do show a marginal retention in strength among transwomen athletes who have undergone hormone treatments, such studies do not show any additional safety risk these retained strength benefits may impose upon cisgender female athletes above and beyond those they already face in contact-sport competition.[81] When considering the safety concerns *between* individual women competitors within an the female sports category, they are far less evident than the media may make them seem.

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[79] *See infra* note 133. Because any regulation would be in the context of elite sport, Title IX does not apply. *See* 20 U.S.C. § 1681(a)(1) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any *education program or activity* receiving *federal* financial assistance.") (emphasis added).

[80] It is undeniable that performance advantages of male-at-birth athletes over cisgender female athletes are well documented. *See* Part III.c.ii.1. However, our inquiry must center on whether any advantages transwomen athletes may have over cisgender female athletes create a heightened risk to the safety of cisgender female athletes when they compete against transwomen athletes.

[81] *See infra* notes 92, 113 and accompanying text.

First, consider non-contact sports. Any safety rationale would fall flat here because there is no risk of contact between athletes. Swimmers and track athletes compete in separate lanes.[82] Gymnasts compete individually on the competition floor. Even if we consider open-road non-contact sports like distance running or cycling, there is no heightened risk of a collision injury simply because a cisgender woman is competing next to a transgender woman.

Safety concerns have more weight if a third-gender policy is applied to contact sports. However, it is important to recognize that female athletes already compete against other female athletes that are bigger, taller, or stronger than they are simply because everyone is unique. We celebrate athletes who have innate biological advantages in sport, even if that can make them more dangerous in contact sports. As the director of the Center for Genetic Medicine Research at Children's National Hospital in Washington, D.C. has remarked, "[e]ven if transgender athletes retain some competitive advantages, it does not necessarily mean that the advantages are unfair, because all top athletes possess some edge over their peers."[83] So, to meet their burden of showing an important interest, proponents of a third-gender category would need to show some heightened,

[82] Additionally, warm up areas are already mixed gender where both male and female events are held at the same venue, so there can be no added safety risk from allowing transwomen athletes to compete, regardless of what category in which they do so.

[83] Gillian R. Brassil & Jere Longman, *Who Should Compete in Women's Sports? There Are 'Two Almost Irreconcilable Positions*,' N.Y. TIMES (Aug. 18, 2020) https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html.

unreasonable risk that necessitates state intervention in regulating within the "female" gender category.[84]

That "heightened risk" cannot be shown via examples of sports injuries to cisgender women caused by transgender women competitors. In fact, few examples of these injuries during competition can be found.[85] The example cited by many advocates who wish to keep transgender women out of female sports is the 2014 knockout of Tamikka Brents by transgender MMA fighter Fallon Fox. Fox fractured Brents's orbital bone, forcing the fight to a halt in just over two and a half minutes.[86] An example like this seems to make the safety threat to cisgender female athletes

[84] If studies were available to show that sports injuries increase based on contact between cisgender female athletes and transwomen athletes, this argument would be stronger. However, the lack of a proven insurmountable biological advantage retained by transwomen athletes weakens any causal link states may try to argue exists between relegating transwomen athletes to a third category and promoting the safety of cisgender female athletes. *See infra* notes 92, 113 and accompanying text.

[85] Chris Mosier, *As Elite Sports Think Again About Trans Participation, Our Only Demand is For Fairness*, THE GUARDIAN (Jun. 29, 2022), https://www.theguardian.com/commentisfree/2022/jun/29/sports-trans-participation-transgender-women-swimming.

[86] Rhavesh Purohit, *When Transgender Fighter Fallon Fox Broke Her Opponent's Skull in MMA Fight*, SPORTSKEEDA (Sept. 20, 2021), https://www.sportskeeda.com/mma/news-when-transgender-fighter-fallon-fox-broke-opponent-s-skull-mma-fight.

competing with transgender women more foreboding.[87] Yet, while it is undeniable that the Fox/Brents fight shows the danger MMA athletes face when they step in the ring, we have no evidence that Brents could not have obtained that same injury in a fight against a cisgender woman.[88] And the Brents example is singular: more recent instances of injuries like the one sustained by Brents in her fight with Fox are difficult, if not impossible, to find.

But still, advocates against transwomen participation in women's sport will try to combine daunting stories like the Fox-versus-Brents fight with cherry-picked studies showing that males do

[87] *See* Peyton MacKenzie, *Transwomen Should Not Compete Against Biological Women*, LIBERTY CHAMPION (Jan. 24, 2022), https://www.liberty.edu/champion/2022/01/transgender-women-should-not-compete-against-biological-women/ (highlighting "deeper problem" of safety concerns raised by allowing transgender athletes to compete with biological female athletes); Frank Mir & Terry Schilling, *Not a Fair Fight: Our Athlete Daughters Shouldn't have to Compete with Transwomen*, USA TODAY (Feb. 25, 2021), https://www.usatoday.com/story/opinion/2021/02/25/transgender-women-unfair-playing-field-for-girls-column/6813749002/ (using example of earlier Fox MMA fight to exemplify fears of allowing their daughters to compete against transwomen athletes who transitioned post-puberty).

[88] Orbital fractures are a common MMA injury. In their empirical study, Michael Fliotsos and colleagues found that over seventy percent of MMA injuries were to the eye, and fourteen percent of those were orbital bone fractures. *See* Michael Fliotsos et al., *Prevalence, Patterns, and Characteristics of Eye Injuries in Professional Mixed Martial Arts*, 15 CLINICAL OPHTHALMOLOGY 2759, 2762 (2021).

have a post-puberty biological advantage over females[89] to support their argument that any innate post-puberty advantages are insurmountable, even with hormone treatment.[90] In reality, these arguments can be easily discredited. Advantages sustained by transwomen athletes are *not* insurmountable. Almost all major sports bodies require transwomen athletes to undergo testosterone-suppressing treatment before they can compete in the female category.[91] Testosterone treatment *does* help reduce the innate biological differences that transgender women have after going through male puberty.[92] With testosterone treatment, transgender women reduce their lean

[89] *See infra* note 107 and accompanying text.

[90] *See* Timothy A. Roberts, Joshua Smalley & Dale Ahrendt, *Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications for Sporting Organisations and Legislators*, 55 BRIT. J. SPORTS MED. 577, 581 (2021) (noting that, while study observed decrease in strength among transwomen engaged in testosterone suppression, "exposure to testosterone during puberty results in sex differences in height, pelvic architecture and leg bones in the lower limbs that confer an athletic advantage to males after puberty" which "do not respond to changes in testosterone exposure among post-pubertal adults."). *But see infra* note 92 and accompanying text.

[91] *See supra* note 25.

[92] *See* Joanna Harper, Emma O'Donnell, Behzad Soroui Khorashad, Hilary McDermott & Gemma L. Witcomb, *How Does Hormone Transition Change Body Composition, Muscle Strength and Haemoglobin? Systematic Review with a Focus on the Implications for Sport Participation*, 55 BRIT. J. SPORTS MED. 865, 872 (2021) ("Longitudinal and cross-sectional studies identify that

body mass, muscle cross-sectional area, and muscular strength, posing less of a risk of injury to any of their fellow competitors if there were a collision on the court.[93] While testosterone suppression may not *completely* eliminate the innate biological advantages transwomen athletes have,[94] physical advantages are suppressed to a degree that makes competition safer for all involved.[95]

The lack of scientific evidence justifying proposed safety concerns, the lack of examples of injury, and the decreased advantage sustained following gender affirming hormone treatment each undermine the safety rationale as an important interest. Thus, the safety rationale cannot justify a state-implemented third-gender category in elite sport.[96] If a state third-gender category is to survive, it needs a different justification. So, we turn to a second purported rationale for a third-gender category: preserving the fairness of women's sports.

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hormone therapy in transwomen decreases muscle cross-sectional area, lean body mass, strength and haemoglobin levels, with noted differences in the time course of change.").

[93] *See id.*

[94] *See, e.g.*, Alison K. Heather, *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, 19 INT'L J. ENVIRO. RSCH. & PUB. HEALTH 1, 6 (2022).

[95] *See infra* note 113 and accompanying text.

[96] Even if safety qualified as an important government objective, "it does not bear a substantial relationship to the practice of excluding all and only girls, including those who would face no more safety risk than the average boy." Erin Buzuvis, *Law, Policy, and the Participation of Transgender Athletes in the United States*, 24 SPORTS MGMT. REV. 439, 448 (2021).

ii. Fairness Rationale

Many states regulate transgender participation in *public-school* sports to "preserve" the fairness of female sports.[97] First, to discern why a state may be able to regulate the intricacies of the female category in *elite* sports, it is worth exploring the root of sports' binary gender classifications as it relates to fairness. This will allow us to understand why states attempt to regulate sport-participatory classifications to preserve fairness in the first place. From there, this part will discuss impacts that state regulations have on transgender athletes as citizens meant to be protected by the laws of their state. It is contradictory to justify a policy that is intrinsically unfair to transgender women by removing them from the female sports category only to maintain fairness for cisgender women. Lastly, this part will use a recent case in the Connecticut public-school system to show additional reasons a "fairness rationale" may, but ultimately cannot, be sustained under the first prong of intermediate scrutiny.

1. The Origins of the Sport Gender Binary

The gender binary in sports originated from the exclusion of women from male athletics.[98] "The 'maleness' of sport derived from a gender ideology which labeled aggression, physicality, competitive spirit, and athletic skill as masculine attributes necessary for achieving true

[97] *See supra* note 15.

[98] For example, Baron Pierre de Coubtertin, the founder of the IOC, refused to add women to the Olympics in 1912 because "[a] female Olympics would be inconvenient, uninteresting, un-aesthetic and not correct. The true Olympic hero is, in my opinion, the individual male adult." Sylvain Ferez, *From Women's Exclusion to Gender Institution: A Brief History of the Sexual Categorisation Process within Sport*, 29 INT'L J. HIST. SPORT 272, 273 (2012).

manliness."[99] Thus, elite sport as a domain was reserved for men through the early decades of the twentieth century, so the invention of "[t]he women's sports category [was] the result of the historical exclusion of women from competitive sport."[100]

The exclusion of women from elite sport is grounded in the assumption that "all males (born or 'made') have a physical advantage over all females (born or 'made')."[101] Scholars like Clair Sullivan, a researcher on the intersection of gender and sport, label this assumption the "advantage thesis" and argue that it is fundamental to a mythical "ethic of 'fair play'" followed by most sporting organizations to separate their competitions by sex.[102] This notion of "fair play" and, thus, the sex-dichotomy in sport is seen as central to preserve opportunities for elite female athletes to achieve financial gain and fame, but its inception is based in little other than historical

[99] Susan K. Cahn, *From the "Muscle Moll" to the "Butch" Ballplayer: Mannishness, Lesbianism, and Homophobia in U.S. Women's Sport*, 19 FEMINIST STUD. 343, 344 (1993).

[100] E·Alliance, *Transwomen Athletes and Elite Sport: A Scientific Review*, 34 (2020).

[101] Clair E. Sullivan, *Gender Verification and Gender Policies in Elite Sport: Eligibility and 'Fair Play,'* 35(4) J. SPORT & SOC. ISSUES 400, 402 (2011).

[102] *Id.* at 401.

exclusion[103] and generalized biological differences between male and female athletes.[104] Because the gender dichotomy was not originally about science, it is not well justified at this point. Therefore, a state would need to develop concrete scientific proof of an insurmountable transwoman-athlete advantage to justify further regulation within what was, at its inception, a binary founded upon historically assumed distinctions and discrimination.

Yet scientific proof cannot concretely show that transwomen athletes have an insurmountable advantage at the elite level.[105] Of course, trends in a wide variety of sports clearly show that men are more athletically adept than women. For example, looking at comparisons between the best women track athletes in the 100 meters and 400 meters in 2017, each event's

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[103] Through the Nineteenth Century, women's athletic endeavors were limited and criticized due to the belief that each human had a fixed amount of energy, and it would be hazardous for women to engage in physically arduous activities, especially while menstruating. *See* Richard C. Bell, *A History of Women in Sport Prior to Title IX*, SPORT J. (Mar. 14, 2008), https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/. When women gained access to sport, it was primarily within their own category. *Id.* Since then, the rationale for separate gender categories in sport has rested on fairness grounds, regardless of whether this categorization is the best mechanism for instituting "fair play." Sullivan, *supra* note 101, at 402.

[104] "On average, men perform better than women in sport; however, no empirical research has identified the specific reason(s) why." Bethany Alice Jones, Jon Arcelus, Walter Pierre Bouman & Emma Haycraft, *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies*, 47 SPORTS MED 701, 713 (2017).

[105] *See infra* Part III.d.i.

Olympic, World, and U.S. Champion's time (Tori Bowie and Allyson Felix, respectively) was outperformed by over 15,000 men and boys in that year.[106] It is true that differences between the processes of male and female puberty produce innate biological advantages for males.[107] However, we are not comparing men and women. As will be discussed below, transgender women do not, and will not, have the same physical advantages as male athletes once they undergo hormone treatment.[108] Additionally, while categorizing athletics by gender does create a greater opportunity for women to be competitive, we have no evidence that state regulation of transwomen athletes's participation is necessary to preserve that opportunity.[109] Even if fairness concerns have historically justified the gender binary in elite sports, there is little evidence to suggest that the *state* has an interest in further regulating competition categories, especially in the context of elite

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[106] *See* Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, DUKE L. CTR. FOR SPORTS L. & POL. (2022), https://law.duke.edu/sports/sex-sport/comparative-athletic-performance/.

[107] "All developing embryos become feminized unless masculinizing influences [androgens] come into play at key times during gestation . . . . Testicular production of testosterone is primarily responsible for the difference in male and female testosterone levels, both during development and throughout the individual's lifetime." Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 71–72 (2017).

[108] *See infra* Part III.d.i.

[109] "There is no firm basis available in evidence to indicate that trans women have a consistent and measurable overall performance benefit after 12 months of testosterone suppression." E·Alliance, *supra* note 100, at 8.

sport. Even if the historical binary justifies further state regulation within categories at the surface level, investigating the impacts of such regulation on transwomen athletes diminishes the state interest in fairness.

2. Impact of Third-gender Categories on Transwomen Athletes

If a state determines that certain individuals who identify as women cannot compete as women, the state is depriving those individuals of fair treatment under the law.[110] By trying to promote the fairness of women's sports, a state is forced to deprive transgender women of fair competitive opportunities. Additionally, this type of regulation in effect subdivides women into those deemed female enough and those not: a state justifies regulating which women compete in the "female" category and which compete in the "third-gender" category to "protect the integrity of women's sports" by defining who gets to be a true female and who is "other."[111] Yet, medically, transgender women treated via testosterone suppression for at least a year experience decreases in muscle mass and hemoglobin levels, the latter of which typically falls within the normal biological-

[110] *See supra* Part III.a.

[111] It is true that sports have typically been categorized using language referencing biological sex. However, "[i]n sport, the terms 'sex'/'gender', 'male'/'man' and 'female'/'woman' are often conflated by commentators, some sport academics and sport organisations." Irena Martinkova, Taryn Knox, Lynley Anderson & Jim Parry, *Sex & Gender in Sport Categorization: Aiming for Terminological Clarity,* 49 J. PHIL. SPORT 134, 135 (2022). This includes World Aquatics, who refers to categories in terms of gender but refers to athletes in terms of sex. *Id.* Thus, we should be careful to avoid overexaggerating the importance of sports categories using the term "female" over "woman" when discussing who should be allowed to compete in the traditional binary categories.

female range.[112] Additionally, it is well established within the medical community that transgender women are women.[113] By relegating transgender athletes to a third category, a state would be telling them that they are not "woman" enough to compete. This type of justification "undermines their autonomy to identify as members of the gender with which they desire to participate."[114] When a state's purported rationale further marginalizes an already historically-discriminated-against class of individuals, such a rationale can hardly ever be an "important government interest."[115] This is especially true in the context of sports, where history shows no clear rationale

[112] *See* Harper, et al., *supra* note 92, at 870–71.

[113] Every person has a gender identity, which cannot be altered voluntarily or ascertained immediately after birth. Colt Meier & Julie Harris, AM. PSYCHOL. ASS'N, *Fact Sheet: Gender Diversity and Transgender Identity in Children* 1, http://www.apadivisions.org/division-44/resources/advocacy/transgender-children.pdf; *see also* Am. Acad. of Pediatrics, *Gender Identity Development in Children* (2015), https://healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Identity-and-Gender-Confusion-In-Children.aspx. "Being transgender is not a choice." Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 612 (4th Cir. 2020).

[114] Erin Buzuvis, *Law, Policy, and Participation*, *supra* note 96, at 441.

[115] A state should be particularly wary when trying to regulate transgender individuals because many suffer from gender dysphoria. Gender dysphoria is characterized by extreme mental health impacts resulting from the incongruence between an individual's gender identity and sex assigned at birth. AM. PSYCHIATRIC ASS'N, *Diagnostic and Statistical Manual of Mental Disorders* 451–53 (5th ed. 2013). One of the critical methods of treatment is social transition, which requires living one's life in accord with one's gender identity. A third-gender category can limit the ability of

for sex-categorization other than that it is what has always been done since women began competing in elite sport.[116] It can hardly be said that states have an important interest in regulating the "fairness" of women's sports when the purported rationale for distinguishing between male and female athletics is grounded largely in outdated notions of female incapacity.[117] Knowledge that differences in athletic performance between male and female athletes still exist should not justify the relegation of transwomen athletes to a third category when insurmountable performance advantages after at least a year of testosterone suppression cannot be proven.[118] In an area as

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transgender athletes to socially transition, thus worsening the mental health ramifications of gender dysphoria. A government policy negatively impacting a class of citizens to this extent can hardly further an important government interest. For further discussion on the impact of transgender athlete marginalization on gender dysphoria, see Mary E. Dubon, Kristin Abbott & Rebecca L. Carl, *Care of the Transgender Athlete*, 17 CURRENT SPORTS MED. REPS. 410, 415–16 (2018).

[116] This note does not argue against the separation of male and female sports. It is clear that, at least now, male athletes do have performance advantages, post-puberty, over female athletes. However, it does not logically follow that transwomen athletes should be relegated to a third category under the guise of "fairness" for the same reasons that created the gender binary in sport, especially when a preexisting sports category aligns with their preferred gender identity.

[117] *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 900 (2012) ("Because laws based on animus cannot survive rational basis review, by definition neither can they survive intermediate or strict scrutiny."). *See also supra* note 44; *infra* Part III.d.i.

[118] See *supra* Part I and *infra* Part III.c.2.iii for discussions about the checkered track record of elite or nearly-elite transwomen athletes's winning streaks.

privatized as elite sport, where state governments have only recently started regulating,[119] creating a third-gender category to insulate the female gender category cannot evince an important government interest where the government has not taken a stance before, let alone a stance so intrusive into the identity of transgender individuals.

3. Why Policies are Being Challenged: Between a Rock and a Hard Place

A recent Connecticut case[120] exemplifies the difficulties that sports administrative bodies face when balancing the competitive opportunities for cisgender and transwomen athletes. In *Soule v. Connecticut Association of Schools*, the plaintiffs contended that the Connecticut Interscholastic Athletic Conference policy violated Title IX.[121] The policy allows high school students to compete on gender specific athletic teams consistent with their gender identity (even if different from their sex assigned at birth).[122] The plaintiffs argue that the policy deprives cisgender athletes of a chance to be champions and the records-of-results could affect prospects at future employment.[123] However, all three plaintiffs beat the transwomen athletes they competed against at least once,

[119] *See* Koller, *supra* note 10, at 685 (discussing the lack of law enacted to regulate sports). States have recently begun regulating in areas aimed at sports health and safety, such as in the concussion context. *See id.* at 683; *supra* note 15.

[120] Soule v. Conn. Assoc. of Schs., No. 21-1365-cv, 2022 WL 17724715 (2d Cir. Dec 16, 2022).

[121] *Id.* at *1.

[122] *Id.*

[123] *Id.* The Second Circuit did not rule on the merits, instead dismissing the case because the plaintiffs lacked standing. *Id.*

showing that transwomen athletes do not have some insurmountable performance advantage, even without testosterone treatment.[124]

While this case was filed under Title IX by private individuals arguing against transwomen participation in the female category, states could use the arguments raised by the plaintiffs to provide some additional support for a governmental "fairness" rationale in the elite context. These two arguments (deprivation of a chance to be champions and lost employment) are especially relevant in elite sports where participants are professional athletes. Thus, being deprived of a "chance to be champions" (by losing to a transwoman athlete) may very well be detrimental to a cisgender female's employment prospects.[125] This is especially evident in individual sports like swimming or track and field. Elite individuals are selected for international travel teams based on placement in competition.[126] Thus, states may argue they are protecting the fair opportunity for

[124] *Id.* at *2.

[125] I recognize I am combining the two rationales proffered by the plaintiffs in *Soule*. I do this because deprivation of a "chance to be champions" in this context would fail as it did in *Soule* because all athletes are being given the opportunity to compete. *Cf.* McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 295–96 (2d Cir. 2004).

[126] In swimming, a country can send their top two athletes in each individual event to the Olympics, so long as they achieve the Olympic Qualification Time. Sean McAlister, *How to Qualify for Swimming at Paris 2024. The Olympics Qualification System Explained*, INT'L OLYMPIC COMM. (Oct. 1, 2022), https://olympics.com/en/news/how-to-qualify-for-swimming-at-paris-2024. In track and field, the top three athletes from a country may qualify for individual Olympic events. Sean McAlister, *How to Qualify for Athletics at Paris 2024. The Olympics Qualification System*

women to compete for national team spots and preserving equal employment opportunities between male and female athletes.

This argument may sound persuasive at first glance. However, there is no reason that cisgender athletes cannot be competitive with transgender athletes.[127] Additionally, while this rationale protects the rights of cisgender athletes, it does not prevent the state from depriving transwomen athletes from the right to compete and gain employment opportunities.[128] If transwomen athletes are forced into a third category, there will be no meaningful, equal opportunity for them to compete for spots on international team rosters at all.[129] Unless a third-

Explained, INT'L OLYMPIC COMM. (Dec. 20, 2022), https://olympics.com/en/news/how-to-qualify-paris-2024-athletics-qualification-system-explained.

[127] *See* Soule v. Conn. Assoc. of Schs., No. 21-1365-cv, 2022 WL 17724715 at *2 (2d Cir. Dec 16, 2022); *2022 NCAA Division I Women's Swimming & Diving Championships Results*, *supra* note 2.

[128] Historically, athletes competing outside "mainstream" athletic competitions have not received the same opportunities as athletes in the traditional sports paradigm. For example, Paralympic athletes only recently received equal pay for medaling at the Paralympics. Oksana Masters, *Paralympians to Earn Equal Payouts as Olympians in the USA*, INT'L PARALYMPIC COMM. (Sept. 24, 2018), https://www.paralympic.org/news/paralympians-earn-equal-payouts-olympians-usa.

[129] It is undeniable that in elite sports, coming in third rather than second can cost an athlete a trip to the Olympics. However, while the practical drawbacks of a third-gender category are outside the scope of this note, if transwomen athletes are forced into a third category, there will be no meaningful, equal opportunity for them to compete for Olympic spots at all. *See infra* Part IV.b.

gender category is equally competitive and can give its participants the same opportunities at all levels of competition, a state third-gender policy inherently restricts transwomen athletes's opportunities in order to preserve cisgender female athletes's opportunities.

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This part has shown that the rationales states use to justify regulating transgender participation in scholastic sports are not sufficient to support state regulation of transgender participation in elite sport. At the very least, neither safety nor fairness concerns can support relegating transwomen athletes to a distinct competitive category. However, even if a court finds that a state has an important interest in regulating transgender participation in elite sport via a third-gender category, the state still must prove that a third-gender category is a sufficiently related means to implement that interest under intermediate scrutiny.[130] It is to this prong of equal protection analysis we now turn.

d. Substantial Relation

Even if regulating to protect the safety or fairness of women's sports were important-enough government interests, the means adopted are not substantially related to either of those interests. For a state to justify a third-gender category, the state would need to rationalize regulating even more invasively than based on physiological differences between men and women[131] because

[130] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 200 (1976) (statistics presented by the state were not substantially related to its proffered important interest).

[131] Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 607 (4th Cir. 2020) (*citing* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985); United States v. Virginia, 518 U.S. 515, 534 (1996)).

a third-gender category inherently regulates *between* those who identify as women. Intermediate scrutiny does not require that the government adopt the least-restrictive means to achieve its end.[132] However, a "substantial relation" does necessitate a strong connection between the means employed and the purported end.[133] Courts prefer an empirical showing that the complained-of problem would likely be remedied by the adopted regulation.[134] This part will survey relevant studies that could be used to attempt to sustain, or attack, a third-gender category. This analysis will show that science cannot sufficiently link any purported benefits of a third-gender category to sustaining the safety or fairness of women's sports in a way that satisfies intermediate scrutiny.

i. An Empirical Overview of Remaining "Inherent Biological Advantage"

The rationale for protecting the safety or fairness of women's sports emerges primarily from the assumption that transgender women have an innate physical advantage over cisgender

[132] *See Virginia*, 518 U.S. at 573 (1996) (Scalia, J. dissenting).

[133] "A remedial decree, this Court has said, must closely fit the constitutional violation." *Id.* at 547.

[134] *See Craig*, 429 U.S. at 200–01 (finding inaccurate or weak statistical evidence to be insufficient to sustain substantial relation to traffic safety rationale for different drinking ages between men and women); *Grimm*, 972 F.3d at 614 (no substantial relation existed to government actor's purported goal where the government presented no evidence justifying state's privacy concerns for regulating transgender individual's choice of bathroom); Hecox v. Little, 479 F. Supp. 3d 930, 975 (D. Idaho 2020) (finding no substantial relationship to purported goals of ensuring equality and opportunities for female athletes in Idaho where government provided no empirical evidence to support its interest in instituting a transwomen athlete ban in scholastic sports).

women by the very fact that they were assigned male at birth.[135] Yet, as explained below, scientific evidence cannot support using these rationales to relegate transwomen athletes to a third-gender category. There may be a better solution to including transwomen athletes in elite sports and allowing them to compete in line with their gender identity besides competing in the women's category; the key point here is that a solution that relegates them to a third-gender category *cannot* withstand intermediate scrutiny.

As we will see, various scholars have reached differing conclusions as to the performance benefits retained by transwomen athletes post-hormone treatment. For example, some conclude that "currently, there is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition."[136] Yet others find sustained strength retention after a year of hormone therapy, even if cardiovascular benefits are nullified.[137] This lack of consensus in empirical research indicates how problematic it would be for a state to rest its third-gender category on science.

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[135] Because this inherent assumption lies at the heart of both a safety or fairness rationale for government intervention, my arguments about the substantial relationship between the government's interest in regulating transgender participation in elite sports and a third gender category will simultaneously address both rationales discussed in Parts III.c.i and III.c.ii.

[136] Jones et al., *supra* note 104, at 710. *See also* E·Alliance, *supra* note 100, at 4 ("Available evidence indicates trans women who have undergone testosterone suppression have no clear biological advantages over cis women in elite sport.").

[137] *See* Harper et al., *supra* note 92, at 870, 872; Roberts et al., *supra* note 90, at 579.

On top of the lack of consensus on retained benefits, methodological approaches used by researchers raise further questions about the reliability of their studies. In its comprehensive literature review of transgender athlete participation in elite sport, E·Alliance found that the limited studies available which asses transgender athletes's capabilities are flawed. First, studies available compare transgender women to cisgender men, not to cisgender women, to assess retained advantage.[138] This assumes that transgender women are most comparable to cisgender men, when data shows that neither pre-testosterone nor post-testosterone-suppression transgender women can be compared to cisgender men because of differences in baseline height and weight.[139] Additionally, studies show that testosterone levels, as one biological marker among many, are not sufficient to predict sporting success.[140] Yet, studies largely assume testosterone links to performance without providing a basis for use of that metric over other factors like lean body mass or strength.[141] Lastly, E·Alliance found that sedentary transwomen appear to be firmly within the normal distribution of lean body mass, cross section area, and strength in cisgender women, suggesting "no residual effect on these traits exist once variations in height, weight, participation

[138] E·Alliance, *supra* note 100, at 20.

[139] *Id.*

[140] *Id.* at 16 (*citing* Stephane Bermon & Pierre-Yves Garnier, *Serum Androgen Levels and Their Relation to Performance in Track and Field: Mass Spectrometry Results from 2127 Observations in Male and Female Athletes*, 51 BR. J. SPORTS MED. 1309 (2017)).

[141] *Id.* at 22. *See also supra* note 23 and accompanying text.

rates and social factors are accounted for."[142] Thus, the scientific evidence does not come close to conclusively showing that transwomen athletes have an innate competitive advantage as would be required to overcome an equal protection challenge.[143]

ii. Why Advantage Still Isn't Sufficient

E·Alliance's study is relevant because it reveals that current science cannot conclusively show transwomen athletes retain an *overwhelming* competitive advantage post-testosterone suppression. Studies cited by E·Alliance do acknowledge that strength benefits may linger, even after three years of testosterone suppression.[144] Yet, they also confirm that twelve months of testosterone suppression reduces transwomen athletes's endurance advantages over cisgender

[142] *Id.* at 24. E·Alliance does not cite any like comparisons between elite transwomen athletes and elite cisgender athletes. Thus, we must infer that these sedentary-focused studies will track onto elite athletes. Additionally, we should not be alarmed that these studies account for height or weight because, in many elite sports, cisgender women compete against other cisgender women who may outweigh them by fifty pounds or be up to a foot taller than them. *See supra* Part III.c.i.

[143] If anything, the science shows that transwomen who have received twelve months of hormone therapy lose performance advantages. Roberts et al., *supra* note 90, at 580–81. However, any conclusion on the best policy proposal regarding testosterone suppression to allow transwomen to compete is beyond the scope of this note. This scientific evidence is relevant to the legal framework of my argument insofar as it shows that a state could not justify separating transwomen from the female category on fairness or safety grounds because the state's fairness and safety concerns are unsubstantiated.

[144] *See* Harper et al., *supra* note 92, at 872; Roberts et al., *supra* note 90, at 579.

female athletes.[145] Thus, even if strength advantages linger, we must focus on whether these slight advantages make the fairness or safety interests sufficient enough to be substantially related to a policy relegating transwomen athletes to a third-gender category.

Taryn Knox, Lynley Anderson, and Alison Heather, three sports and medical ethics experts, rely on the concept of "tolerable unfairness" to argue that retained advantages should not bar transwomen athletes from competing in their preferred gender-identity category.[146] Many aspects of sport already embrace certain "tolerable unfairnesses" such as socioeconomic factors or biological advantages.[147] Thus, allowing transgender women to compete in order to fully embrace their gender identity, regardless of any sustained biological advantages, can just be added to the list of pre-existing "tolerable unfairnesses."[148] This argument further compounds on the lack of evidence a state could present that any safety concerns or unfairness to cisgender women athletes would be resolved by relegating transgender women to a third category.

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[145] *See* Harper et al., *supra* note 92, at 870; Roberts et al., *supra* note 90, at 579.

[146] Taryn Knox, Lynley C. Anderson & Alison Heather, *Transwomen in Elite Sport: Scientific and Ethical Considerations*, 45 J. MED. ETHICS 395, 399 (2019).

[147] *Id.*

[148] Andria Bianchi counters this argument by saying that transgender women's advantage in sport is "intolerably" unfair because no cisgender woman can achieve the same advantage because of doping rules. *See generally* Andria Bianchi, *Transwomen in Sport*, 44 J. PHIL. SPORT 229 (2017). However, in sport some women can never achieve the innate biological advantages of their cisgender female competitors, like height or wingspan.

Additionally, recent actions taken in conservative states to prevent minors from receiving gender-confirming care would foreclose any avenue (in those states) for a transgender woman to compete in the female category. World Aquatics mandates pre-puberty transition[149] to compete in the female category because scientific consensus has built around the understanding that differences in biological ability between male and female individuals generate after puberty.[150] Yet, transwomen athletes in Texas would be barred from women's competition if the state adopted a third-gender category because transwomen athletes could not transition pre-puberty due to Governor Abbott's latest directive to the Texas Department of Family and Protective Services, which classifies medical treatments for transgender adolescents as "child abuse" under state law.[151] Thus, the criteria articulated by World Aquatics exacerbate equal protection problems. Without the ability to transition, an elite transwoman athlete is effectively foreclosed from the opportunity to compete in line with her gender identity. It is hard to imagine how a "fairness" rationale could justify a policy with such unfair results under intermediate scrutiny.

Two logical conclusions must be adopted if we are to agree that a third-gender category does not survive the second prong of intermediate scrutiny. First, empirical evidence cannot justify

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[149] World Aquatics Policy, *supra* note 13, at 7.

[150] *See generally* David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 CLINICAL ENDOCRINOLOGY 68 (2017).

[151] Letter from Governor Greg Abbott to Texas Department of Family and Protective Services (Feb. 22, 2022). *See also* Alene Bouranova, *Explaining the Latest Texas Anti-Transgender Directive*, BU TODAY (Mar. 3, 2022), https://www.bu.edu/articles/2022/latest-texas-anti-transgender-directive-explained/.

regulating transgender participation in sport because there is no conclusive evidence showing that transwomen athletes retain an insurmountable competitive advantage post-testosterone suppression. Second, even if the remaining advantage was a heightened concern, it cannot be substantially related to a policy in which a state determines that certain women do not deserve to compete in line with their gender identity. While state interests may suffice to allow regulation of gender categorization in sport, this part has shown that those interests do not justify relegating transgender women to a third-gender category. Thus, any state-sponsored third-gender category would fail to survive constitutional attack.

But what about non-state actors? As previously discussed, elite sport in the United States is largely privatized.[152] Part IV will explore the legal challenges private sporting bodies, like NGBs, will face if they attempt to adopt a third-gender category.

IV. PRIVATE SPORTING BODIES AND THE LAWS THEY FACE

a. Public Accommodation Laws

The federal government and each of the fifty states have their own public accommodation statutes. Broadly, these statutes prohibit discrimination against certain classes of individuals in places of public accommodation.[153] Currently, twenty-four states prohibit discrimination based on

[152] *See supra* notes 6–10 and accompanying text.

[153] Every state with a public accommodation law prohibits discrimination in public accommodations based on race, gender, ancestry, and religion. *State Public Accommodation Laws*, NAT'L CONF. STATE LEGISLATURES (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx. The federal government's public

gender identity. Albeit using different language, each of these states defines "public accommodation" to include sporting arenas (some more explicitly than others).[154] Because a third-

accommodations statute does not protect individuals from discrimination based on gender identity. *See* 42 U.S.C. § 2000a(a). Thus, this section focuses purely on state law.

[154] California, Connecticut, Delaware, Iowa, New Mexico, Vermont, and Virginia broadly define public accommodations as any place serving the general public. *See* CAL. CIV. CODE § 51(b) (West 2016); CONN. GEN. STAT. § 46a-63 (2023); DEL. CODE ANN. tit. 6 § 4502 (2022); IOWA CODE § 216.2(13) (2019); N.M. STAT. ANN. § 28-1-2(H) (2021); VT. STAT. ANN. tit. 9 § 4501(1) (2019); VA. CODE ANN. § 2.2-3904 (2021). Colorado, Washington D.C., Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Washington directly include sporting arenas (some specifically enumerating places like swimming pools and gymnasiums) in their definitions of "public accommodations." *See* COLO. REV. STAT. § 24-34-601 (2021); D.C. CODE § 2-1401.02(24) (2022); HAW. REV. STAT. § 489-2 (2019); 775 ILL COMP. STAT. 5/1-101 (2006); ME. STAT. tit. 5 § 4553(8) (2022); MD. CODE ANN. STATE GOV'T § 20-301 (2019); MASS. GEN. LAWS ch. 272 § 92A (2016); MICH. COMP. LAWS § 37.2301 (2023); NEV. REV. STAT. § 651.050 (021); N.H. REV. STAT. ANN. § 354-A:2 (2018); N.J. STAT. ANN. § 10:5-5 (2020); N.Y. EXEC. LAW § 292(2) (2022); OR. REV. STAT. § 659A.400(1) (2022); 43 PA. CONS. STAT. § 954 (2019); R.I. GEN. LAWS § 11-24-3 (2022); WASH. REV. CODE § 49.60.040(2) (2020). Minnesota and Wisconsin define public accommodations to include any place of recreation. *See* MINN. STAT. § 363A.03 (2023); WIS. STAT. § 106.52 (2016).

gender category inherently discriminates on the basis of sex,[155] if private sporting bodies adopt third-gender categories and proceed to host competitions at public accommodations, transwomen athletes may sue under state public accommodation laws where applicable. In fact, transwomen athletes have already successfully used these statutes to remedy discrimination against them.

i. Examples of Public Accommodation Laws in Action

In 2021, Jaycee Cooper filed a lawsuit against USA Powerlifting and USA Powerlifting Minnesota alleging sex and sexual orientation discrimination in violation of the Minnesota Human Rights Act.[156] Ms. Cooper, a competitive women's powerlifter and transgender woman, alleges she was denied the opportunity to compete based on her transgender status.[157] Ms. Cooper alleges that "Defendants USAPL and USAPL MN discriminated against Ms. Cooper in public accommodations by denying her application to compete because she is a transwoman, by subsequently enacting a policy categorically banning transwomen from USAPL competitions, and by organizing, promoting, and executing sanctioned powerlifting meets in Minnesota at which transwomen were categorically barred from competing."[158] Because powerlifting competitions are held in a place of recreation, Minnesota's public accommodations statute applies to prevent discrimination against transgender athletes in competition.[159] Ms. Cooper's case shows that

[155] *See infra* Part III.B.i.

[156] MINN. STAT. § 363A.11 (2023).

[157] Complaint at 1, 21, Cooper v. USA Powerlifting, No. 0:21-CV-00401 (D. Minn. Feb. 11, 2021).

[158] *Id*. at 21.

[159] MINN. STAT. § 363A.03 (2023). Individuals looking to use public accommodations statutes for recourse must look to the precedent of their respective jurisdiction to understand how public

transgender athletes may use state public accommodations statutes to protect themselves from discriminatory policies like third-gender categories.

Other athletes have also used public accommodations statutes to fight categorical bans on transwoman-athlete participation in sport. In 1977, a lower state court in New York ruled that the U.S. Tennis Association had violated state non-discrimination law when it implemented a chromosome test for the purpose of excluding Renee Richards from the women's draw of the U.S. Open.[160] Since Richards's case, there had yet to be another successful plaintiff remedying discrimination against transgender athletes until Christina Ginther sued the Independent Women's Football League.[161] Christina Ginther, a transgender woman, joined an all-female football league

accommodations laws may apply to them. A complete survey of each state's public accommodation law applies is outside the scope of this note. I focus on Ms. Cooper's suit and Minnesota's public accommodation law only to show that these statutes will serve as a tool for transwomen athletes to challenge any adopted third-gender category. For a discussion of the scope and application of state public accommodation laws, see generally Lisa G. Lerman & Annette K. Sanderson, Comment, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238–86 (1978).

[160] Buzuvis, *Law, Policy, and Participation*, *supra* note 96, at 446.

[161] *See* Ginther v. Enzuri Grp., Inc., No. 19HA-CV-17-857, 2020 WL 588024 (Minn. Ct. App. Oct. 5, 2020).

in 2016.[162] When her team found out she is transgender, the football league discriminated against her in violation of the Minnesota Human Rights Act.[163] Ginther sued, and a jury awarded her $20,000.[164] The more frequently private sporting organizations discriminate against transwomen athletes, the more useful these statutes will become in fighting discrimination. The successes of athletes like Richards and Ginther create a path forward for transwomen athletes should NGBs or other private sports organizations adopt a third-gender category.

Proponents of third-gender categories may argue that public accommodations laws should not apply to sports because competitions are not always open to the public. It is general knowledge that most elite sporting competitions require qualification to be able to compete. Yet, the above examples show that transwomen athletes have challenged discriminatory policies based on their inability to participate even at the highest level of sport, where qualification would be required.[165] Even the strongest critics of transwomen participation in elite female sport cannot deny the

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[162] *See* Mary Lynn Smith, *Jury's Award to Transwoman after Rejection by Football Team is a Minnesota First*, STAR TRIBUNE (Dec. 21, 2018, 10:17 P.M.), https://www.startribune.com/jury-s-award-to-transgender-womanrejected-by-football-team-is-a-minnesota-first/503365442.

[163] Ginther specifically sued under the business discrimination section of the Minnesota Human Rights Act. *See* MINN. STAT. § 363A.17 (2023). She argued that the team discriminated against her based on her "sexual orientation." *Ginther*, 2020 WL 588024, at *1.

[164] *Id*.

[165] Cooper was barred from competing at the Minnesota State Bench Press Championships and Minnesota Women's Championship. Complaint at 14, Cooper v. USA Powerlifting, No. 0:21-CV-00401 (D. Minn. Feb. 11, 2021).

applicability of these statutes to prevent discrimination against transgender athletes in elite sport. Nancy Hogshead-Makar, an Olympic gold medalist, is a strong advocate for excluding transwomen athletes from women's sport. In a public statement to a Florida news outlet, Hogshead-Makar said, "I agree that trans women are women for all purposes, meaning the classroom and the employment and family law and *public accommodations*, et cetera. But when it comes to sport, you cannot deny biology and facts."[166] Yet, because twenty-four states prohibit discrimination against transgender individuals in public accommodations, Hogshead-Makar's statement is inherently contradictory.

Transgender women must be given an equal opportunity to compete when competitions are held at public accommodations where applicable law exists.[167] A third-gender category is not an equal opportunity. Transgender women are severely underrepresented in sport and a third category implicitly tells transgender women that they are not "woman enough" to be seen as female in sports. This is inherently discriminatory.

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[166] Julie Kleigman, *Understanding the Different Rules and Policies for Transgender Athletes*, SPORTS ILLUSTRATED (Jul. 6, 2022), https://www.si.com/more-sports/2022/07/06/transgender-athletes-bans-policies-ioc-ncaa (emphasis added).

[167] For a general example, the federal public accommodations statute states, "all persons shall be entitled to the full and equal enjoyment" of public accommodations. 42 U.S.C. § 2000a(a). While this statute does not prohibit discrimination in public accommodations based on gender identity or sex like the state statutes listed above, it does show that unequal access to public accommodations is discrimination under a public accommodation statute**.**

Even if a NGB or private sporting body decided to create a third-gender category, it would not be able to use public accommodations to run its competitions in twenty-four states.[168] While this note will not address the practicalities of implementing a third-gender category at length, it is worth describing the difficulties national organizations would face in implementing such a category under conflicting state laws. Take USA Swimming as a hypothetical. USA Swimming hosts a variety of meets targeted at elite-level professional athletes. For example, its "Pro Swim Series" consists of four swim meets where top competitors earn prize money for event wins and setting records.[169] These competitions are rarely held in the same state. Thus, if USA Swimming hosted a Pro Swim Series stop in California, California's public accommodation law would prohibit USA Swimming from implementing a third-gender category at the competition if it were held at a public pool.[170] By contrast, if USA Swimming hosted a stop in Texas,[171] USA Swimming could in theory relegate any elite transwomen competitors who do not comply with USA

[168] *See supra* note 154.

[169] Matthew de George, *USA Swimming Announces 2023 Schedule, With Pro Swim Series Stop at New ISHOF Pool* (Jul. 13, 2022), https://www.swimmingworldmagazine.com/news/usa-swimming-announces-2023-schedule-with-pro-swim-series-stop-at-new-ishof-pool/.

[170] *See* CAL. CIV. CODE § 51(b) (West 2016).

[171] Texas does not have a public accommodation statute. *See State Public Accommodation Laws*, NAT'L CONF. STATE LEGISLATURES (Jun. 25, 2021), https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws.

Swimming's transition guidelines to compete to a third-gender category.[172] Thus, participatory guidelines would be different throughout the series, disrupting the continuity of the Pro Swim Series competition.[173] Even putting the practical impossibilities of this hypothetical scenario aside, implementing a third-gender category, even in a state with no protective public accommodation law, would jeopardize USA Swimming's ability to serve as the NGB for swimming under the Ted Stevens Act. It is to these federal law implications we now turn.

b. The Risk of Failing to Qualify as an NGB

As previously discussed, elite sport in the United States is governed almost entirely by NGBs under the Ted Stevens Amateur Sports Act.[174] In order for an organization to qualify for recognition as a NGB, and thus be able to participate in the Olympic movement, the NGB must "provide[] an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition without discrimination on the basis of .

[172] This hypothetical assumes the current guidelines USA Swimming has implemented regarding transgender athlete participation, which require a transgender female to maintain a testosterone concentration of less than 5 nmol/L for a period of at least thirty-six months. USA SWIMMING, *Athlete Inclusion, Competitive Equity and Eligibility Policy* 41, 43 (Feb. 1, 2022), https://www.usaswimming.org/docs/default-source/governance/governance-lsc-website/rules_policies/usa-swimming-policy-19.pdf.

[173] Braden Keith, *USA Swimming Adds New March Pro Swim; Reinstates Prize Money*, SWIM SWAM NEWS (Feb. 8, 2022), https://swimswam.com/usa-swimming-adds-new-march-pro-swim-reinstates-prize-money/.

[174] *See supra* notes 5–6 and accompanying text.

. . sex . . . ."[175] If a private sports organization like USA Swimming tried to create a third-gender category at its elite competitions, the organization would inherently be discriminating on the basis of sex.[176] It would therefore lose its status as a NGB.

NGBs have the power to govern amateur sport in the United States,[177] coordinate national and international championship competitions,[178] and recommend individuals to compete for the United States at the Olympic, Paralympic, and Pan-American Games.[179] They *must* "allow an amateur athlete to compete in any international amateur athletic competition conducted by any amateur sports organization or person,"[180] "provide equitable support and encouragement for participation by women" where sports are gender segregated,[181] and encourage meaningful participation for disabled athletes.[182] While NGBs may "determine eligibility standards for participation in competition,"[183] the explicit requirements of a NGB's obligations serve to protect and promote equal opportunities for all athletes, regardless of ability. If the NGB who has historically undertaken these duties fails to comply with the equal opportunity requirements of

[175] 36 U.S.C. § 220522(a)(8).

[176] *See supra* Part III.b.

[177] 36 U.S.C. § 220523(a)(3).

[178] 36 U.S.C. § 220523(a)(5).

[179] 36 U.S.C. § 220523(a)(6).

[180] 36 U.S.C. § 220524(a)(5).

[181] 36 U.S.C. § 220524(a)(6).

[182] 36 U.S.C. § 220524(a)(7).

[183] 36 U.S.C. § 220523(a)(5).

Section 220523(a)(8), there would be a power void in that sport until a new body existed to fill the infrastructure as required by the Act. Until then, United States sport would suffer at the national and international level. This is because the Ted Stevens Amateur Sports Act does not allow the United States to send athletes to the Olympic Games in a sport without a NGB to select those athletes.[184] Thus, both policymakers and private sporting bodies must ask, "is it really worth relegating transwomen athletes to a separate category to preserve some faint 'fairness' or 'safety' interest when it risks destroying that sport's infrastructure throughout the country and at the international stage?" The analysis provided throughout this note should caution that the answer to that question is a resounding "no."

V. CONCLUSION

When Erica Sullivan arrived at the 2022 NCAA Women's Swimming and Diving Division I Championships, she and her teammates at the University of Texas, Austin were eager to put their hard work throughout the season on display. While Sullivan and her teammates surely delivered on that expectation,[185] Sullivan left the meet feeling as though the record-breaking swimming had

[184] 36 U.S.C. § 220523(a)(6).

[185] The University of Texas Women's Swimming and Diving team finished second overall at the national meet. This was the team's best finish since 1994. Women's Swimming & Diving, *Women's Swimming and Diving Finishes Second at NCAA Championships*, UNIV. OF TEX. (Mar. 19, 2022), https://texassports.com/news/2022/3/19/womens-swimming-and-diving-womens-swimming-and-diving-finishes-second-at-ncaa-championships.aspx#:~:text=ATLANTA%20%E2%80%93%20Texas%20Women's%20Swimming%20and,Longhorns'%20best%20finish%20since%201994.

been overshadowed by certain swimmers and protestors turning the meet into a political statement.[186]

Erica Sullivan is no stranger to stiff competition. As an Olympic silver medalist and member of the USA Swimming National Team since she was seventeen,[187] Sullivan's athletic prowess is incredibly impressive. Yet, Sullivan did not come home undefeated in individual competition at the 2022 NCAA Championships. Sullivan was the runner-up in the women's 1650-yard freestyle and placed third in the 500-yard freestyle behind fellow Olympic silver medalist Emma Weyant in second and Lia Thomas in first.[188] Sullivan remembers nothing extraordinary about the race.[189] She was in first-place contention until about the half-way mark, and finished less than three seconds off the winning time.[190] While happy with her swims and her team's success, Sullivan's experience at the 2022 NCAA Championships was tainted by the political backlash

[186] Zoom interview with Erica Sullivan (Feb. 7, 2023) (transcript and recording on file with author).

[187] Sullivan finished second at the Tokyo Olympic Games in the women's 1500-meter freestyle. *Id.*

[188] *See* James Sutherland, *2022 Women's NCAA Championships: Results and Records Summary*, SWIM SWAM News (Mar. 22, 2022), https://swimswam.com/2022-womens-ncaa-championships-results-records-summary/.

[189] *See* Zoom Interview with Erica Sullivan, *supra* note 186.

[190] *See* Sutherland, *supra* note 188.

surrounding a photograph taken out of context following the 500-yard freestyle race.[191] It is this, and not her achievements in the pool, that colors her memories from the championships.[192]

Sullivan, an avid supporter of LGBTQ+ access in sport,[193] is not surprised by the third-gender category proposal put forth by World Aquatics in 2022.[194] In fact, Sullivan says she wouldn't even be surprised if USA Swimming adopted such a category to keep donors happy.[195] However, Sullivan would find any implementation of a third-gender category incredibly

[191] Conservative news outlets circulated a photo of Thomas standing alone on the podium after the 500-yard freestyle, while Sullivan and her Tokyo Olympics teammates (Emma Weyant and Brooke Forde) took a group photo standing on the third-place podium. These outlets reported that the three women were protesting Thomas' inclusion in the competition. However, both Sullivan and Forde have since denied allegations that this photo was taken in protest, revealing that the photo was posted out of context. *See* REUTERS FACT CHECK*, Fact Check-Women's swimming Contest Photo Shared 'Out of Context,' Says Pictured Athlete* (Mar. 22, 2022), https://www.reuters.com/article/factcheck-sport-swimming/fact-check-womens-swimming-contest-photo-shared-out-of-context-says-pictured-athlete-idUSL2N2VP1XH.

[192] Sullivan revealed how infuriating it was to see right-wing media and even people she knows personally share that photo, especially those who knew she would never protest Thomas's inclusion in the Championships. Dealing with the aftermath took away from her accomplishments in the pool. Zoom Interview with Erica Sullivan, *supra* note 186.

[193] *Id.*

[194] *Id.*

[195] *Id.*

problematic for transgender representation and disrespectful of modern social developments.[196] Sullivan's greatest fears over the implementation of a third-gender category at any level stem from the harassment that transgender individuals face in society at large.[197] She worries that the implementation of a third-gender category will give transphobic individuals a soap box to tout discriminatory rhetoric.[198] Sullivan denounces any "fairness" justification for subjugating transwomen to separate treatment in elite sports because "the fairness cause to save women's sports is just another tactic to fit the transphobic narrative."[199] The fact that a state or private actor would choose to open up transgender athletes to a new arena for harassment is "terrifying."[200]

What elite athletes think about a third-gender category should be part of the conversation surrounding legislative proposals to regulate transgender participation in sport. In fact, many athletes, including Sullivan, would argue that the moral and public policy implications of such a proposal should be reason enough to avoid adopting a third-gender category.[201] While perspective like Sullivan's is crucial to any political debates, the bottom line as shown throughout this note is a legal one. Regardless of any perspective on whether regulating transgender participation in elite sport is normatively good or not, the specific third-gender-category proposal as outlined by World Aquatics could not stand against United States law.

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[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

This is true whether adopted by a state or private actor. As shown in Part III, a state-sponsored third-gender category would fall to a Fourteenth Amendment challenge, even if supported by a "safety" or "fairness" rationale. And in Part IV, we clearly see that a private actor adopting a third-gender category would face legitimacy problems under state and national law. Thus, even if a sports-governing body believed implementing a third-gender category in elite sports was a good policy objective, the legal challenges to such a plan should prevent its adoption.

The debate about how transgender women should compete in elite sports is live and contentious in American society. Some strongly advocate for inclusion with no limits. Others caution against any opportunity for transgender women, especially, to compete in line with their gender identity. Regardless of where one's beliefs fall on this topic, a third-gender category cannot serve as a practical solution to the "fairness in women's sports" debate that has arisen in elite athletics, at least not under the laws of the United States.

Applicant Details

First Name	**Marielle Paloma**
Last Name	**Greenblatt**
Citizenship Status	**U. S. Citizen**
Email Address	**mpg2143@columbia.edu**
Address	**Address** Street **175 Kent Avenue** City **Brooklyn** State/Territory **New York** Zip **11249** Country **United States**
Contact Phone Number	**6104052835**
Other Phone Number	**6104052835**

Applicant Education

BA/BS From	**Columbia University**
Date of BA/BS	**May 2017**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**April 29, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Human Rights Law Review - Executive Articles Editor**
Moot Court Experience	**Yes**
Moot Court Name(s)	**U.C. Davis Asylum & Refugee Law Moot Court** **Columbia LaLSA Asylum & Refugee Law Moot Court**

Bar Admission

Admission(s) **New York**

Prior Judicial Experience

Judicial Internships/ Externships **Yes**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Richman, Dan
drichm@law.columbia.edu
212-854-9370

Sturm, Susan
ssturm@law.columbia.edu
212-854-0062

Funk, Kellen
krf2138@columbia.edu
5056093854

References

Hon. George B. Daniels (212-805-6735, George_Daniels@nysd.uscourts.gov)

Professor Daniel Richman (212-854-9370, drichm@law.columbia.edu)

Professor Kellen Funk (212-854-0675, krf2138@columbia.edu)

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Marielle Paloma Greenblatt
175 Kent Avenue, Brooklyn, New York 11249
610-405-2835 | mpg2143@columbia.edu

June 23, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Detroit, Michigan 48226

Dear Judge Davis:

I am a 2021 graduate of Columbia Law School and a current Law Clerk to the Honorable George B. Daniels in the Southern District of New York. I write to apply for a clerkship in your chambers for the 2024-2025 term.

As a Philadelphia native who dreamed of becoming the first lawyer in my family, I hope to advance my interests in criminal procedure, immigration and asylum appeals, and complex civil litigation through an appellate clerkship. I am an aspiring Assistant United States Attorney and am interested in learning from a judge who served as a federal prosecutor before joining the bench.

My clerkship with Judge Daniels has been stimulating and rewarding. I have written bench memos on substantive and procedural issues across civil and criminal cases, assisted with preparation for hearings and trials, and continued to hone strong writing and research skills. I have thoroughly enjoyed my district court clerkship and hope to apply my experience to your work at the appellate level.

Prior to my clerkship, I worked as a litigation associate at Davis Polk & Wardwell in New York, where I assisted with legal briefs for civil litigation and white collar criminal matters. While in law school, I served as the Executive Articles Editor of the Columbia Human Rights Law Review, the Communications Chair of the Latinx Law Students Association, and a Teaching Assistant.

Enclosed please find my resume, law school transcript, two writing samples, and three letters of recommendation from the following professors:

- Professor Daniel Richman (212-854-9370, drichm@law.columbia.edu)
- Professor Kellen Funk (212-854-0675, krf2138@columbia.edu)
- Professor Susan Sturm (212-854-0062, ssturm@law.columbia.edu)

Judge Daniels is also available to serve as a reference on my behalf and can be reached at 212-805-6735 and at George_Daniels@nysd.uscourts.gov.

Thank you for your time and consideration.

Respectfully,

Marielle Paloma Greenblatt

Marielle Paloma Greenblatt

MARIELLE PALOMA GREENBLATT
175 Kent Avenue, Brooklyn, New York 11249
610–405–2835 | mpg2143@columbia.edu

EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D., with honors, received April 2021

Activities:	*Columbia Human Rights Law Review* – Executive Articles Editor
	Research Assistant to Professor Kellen R. Funk – Spring 2021
	Teaching Assistant to Professor Susan Sturm – Spring 2020
	Latinx Law Students Association – Executive Board, Communications Chair
	Asylum & Refugee Law Moot Court – National Semi–Finalist (3rd place); 2L Coach; 3L Judge
Honors:	Harlan Fiske Stone Scholar; Alpha Zeta Club Merit-Based Tuition Scholarship
Note:	*The Divide Over Compassionate Release Resentencing for Federal Prisoners*, 52 COLUM. HUM. RTS. L. REV. 140 (2020).

COLUMBIA UNIVERSITY, BARNARD COLLEGE, New York, NY
B.A., *summa cum laude,* received May 2017

Majors:	Political Science and Latin American Cultures
Honors:	Phi Beta Kappa, Columbia Spanish Prize, Yale Law School Liman Fellowship
Thesis:	*Credible Fear Interviews in Expedited Removals: Implications of* Matter of A-R-C-G et al.

EXPERIENCE

HON. GEORGE B. DANIELS, September 2022 – Present
U.S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, New York, NY
Law Clerk
Manage active docket of over 130 cases before the Judge. Conduct legal research and write and edit opinions for civil and criminal matters, including securities litigation decisions, *pro se* § 1983 constitutional claims, municipal liability claims, and Article III standing and federal jurisdiction issues. Prepare Judge for criminal hearings, pretrial conferences, and trials.

DAVIS POLK & WARDWELL LLP, New York, NY Summer 2020; September 2021 – 2022
Summer Associate; Law Clerk; Litigation Associate
Conducted legal and factual research in preparation for SEC and DOJ presentations. Drafted appellate brief on behalf of criminal defendant challenging his conviction at trial.

HON. DORA L. IRIZARRY, September – December 2019
U.S. DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, Brooklyn, NY
Legal Extern
Conducted legal research for rulings on motions in civil suits alleging violations of the Fair Labor Standards Act and Fair Debtor Credit Practices Act. Assisted with opinion drafting, editing, bench memo preparation, and cite–checks.

MORRISON & FOERSTER LLP, New York, NY May 2019 – July 2019
1L Summer Associate
Assisted with legal and factual research for pro bono asylum clients.

U.S. DEPARTMENT OF STATE, Chiapas, Mexico July 2017 – June 2018
United States Fulbright Scholar to Mexico
Provided assistance to asylum applicants seeking permanent residence in Mexico. Coached university debate team.

AMERICAN CIVIL LIBERTIES UNION (ACLU), New York, NY May – August 2016
Intern – Immigrants' Rights Project
Analyzed police stop data in federal litigation against former Maricopa County Sherriff Joe Arpaio.

CENTER FOR REPRODUCTIVE RIGHTS, New York, NY January – May 2014
Intern – U.S. Legal Department
Prepared memos on trending state legislation limiting access to abortion in Texas, Louisiana, and Alabama.

BAR ADMISSIONS: New York State.

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CLS TRANSCRIPT (Unofficial)

05/19/2021 14:03:38

Program: Juris Doctor

Marielle Paloma Greenblatt

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	B+
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A-
L6655-2	Human Rights Law Review Editorial Board		1.0	CR
L9172-1	S. Advanced Trial Practice	Heatherly, Gail	3.0	A
L6685-1	Serv-Unpaid Faculty Research Assistant	Funk, Kellen Richard	2.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-1	Corporations	Talley, Eric	4.0	B+
L6655-2	Human Rights Law Review Editorial Board		1.0	CR
L6274-1	Professional Responsibility	Kent, Andrew	3.0	B+
L8868-1	S. The American Bail System [Minor Writing Credit - Earned]	Funk, Kellen Richard	2.0	A+
L9175-1	S. Trial Practice	Heatherly, Gail	3.0	A-

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6410-1	Constitution and Foreign Affairs	Damrosch, Lori Fisler	3.0	CR
L6241-1	Evidence	Capra, Daniel	4.0	CR
L6655-1	Human Rights Law Review		0.0	CR
L6867-1	Independent Moot Court Coaching	Strauss, Ilene	1.0	CR
L8876-1	S. International Criminal Investigations	Davis, Frederick	2.0	CR
L6683-1	Supervised Research Paper	Richman, Daniel	1.0	CR
L6822-1	Teaching Fellows	Sturm, Susan P.	3.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	B
L6652-1	Ex. Federal Court Clerk EDNY	Garaufis, Nicholas; Lifshitz, Allon	1.0	CR
L6652-2	Ex. Federal Court Clerk EDNY-Fieldwork	Garaufis, Nicholas; Lifshitz, Allon	3.0	CR
L6655-1	Human Rights Law Review		0.0	CR
L6867-1	Independent Moot Court Coaching	Strauss, Ilene	1.0	CR
L6169-1	Legislation and Regulation	Doerfler, Ryan D	4.0	B+
L6675-1	Major Writing Credit	Richman, Daniel	0.0	CR
L6683-1	Supervised Research Paper	Richman, Daniel	2.0	A

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-2	Constitutional Law	Barenberg, Mark	4.0	B
L6108-2	Criminal Law	Scott, Elizabeth	3.0	B+
L6862-1	Lalsa Moot Court	Rodriguez, Alberto; Strauss, Ilene	0.0	CR
L6369-1	Lawyering for Change	Sturm, Susan P.	3.0	A
L6121-21	Legal Practice Workshop II	Rodriguez, Alberto	1.0	P
L6118-1	Torts	Liebman, Benjamin L.	4.0	B+

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-1	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Huang, Bert	4.0	B+
L6105-6	Contracts	Mitts, Joshua	4.0	B+
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-1	Legal Practice Workshop I	Smith, Trisha; Whaley, Hunter	2.0	P
L6116-1	Property	Merrill, Thomas W.	4.0	B+

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 85.0

Total Earned JD Program Points: 85.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	Harlan Fiske Stone	3L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	1.25

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Re: Marielle Greenblatt

Dear Judge Davis:

I write to enthusiastically support the application of Marielle Greenblatt -- a 2021 graduate of Columbia Law School now clerking for Judge Daniels in the SDNY -- to clerk in your Chambers thereafter. She is a wonderful writer, dogged case analyst, and extraordinary person, and I'm confident she would do superb work for you.

I got to know Marielle quite well during her 2L year in the course of supervising her Note for the Human Rights Law Review. Long before most of her classmates were even thinking about Note topics, Marielle had decided to write about how the First Step Act had opened up new avenues for federal inmates to seek Compassionate Release. Once she had signed me up as a supervisor, my main job was to sit back and watch Marielle get to work. She is a wonderful self-starter, with an energy and discipline perfect for tracking and assessing fast-emerging lines of cases. And "lines" they were, as Marielle powerfully detailed through her analysis of the different approaches district courts have taken to their newly granted authority. She has an impressive ability to sort through voluminous caselaw but never lose track of the bigger picture and the important themes.

Marielle's final product is a significant contribution to the literature, and a beautifully written one to boot. She was also a delight to work with – extraordinarily smart when addressing concerns I raised, and able to execute re-writes speedily and cogently. Her peers seem to have recognized Marielle's boundless talents and the importance of her Note. The piece was selected for publication, and Marielle was chosen to be Executive Articles Editor of her journal.

It was quite inspiring to see how Marielle saw her Note as much as a public service as a personal writing project. She reached out to Professor Doug Berman, the Ohio State Law prof who writes the indispensable Sentencing Law and Policy blog, and Professor Shon Hopwood, a Georgetown Law prof who has focused on compassionate release issues, and worked hard with both to make her data collection and analysis accessible to practitioners and judges.

Even as Mariella was finalizing her Note, she immediately realized how the novel coronavirus pandemic would put enormous strain on federal prisons and on the law governing compassionate release. As the daughter of two emergency healthcare workers treating COVID-19 cases in Philadelphia, Marielle collaborated with her parents on a piece that, she tells me, "discusses the impact of COVID-19 in federal prisons, and highlights the importance of second looks via compassionate release for the most vulnerable prisoners." She has tracked and analyzed the emerging array of district court and appellate opinions.

Marielle's 1L grades are very good, but, given what I know to be her extraordinary capacity for mastering new materials, she somewhat underperformed. Indeed, when she took Criminal Adjudication with me during her 2L year, her exam performance was way below what her terrific class participation led me to expect. I suspect law school exams are not her forte. Overall, her 3L grades were quite solid. In any event, my experiences with Marielle's work leave me with no doubts that she will excel as a lawyer.

I also have no doubt that Marielle will use her enormous talents in the service of a greater good. The daughter of a Mexican mother and Jewish father, she was raised in both traditions. She also speaks Spanish fluently, and draw on that knowledge when working for the State Department, a year after Barnard College (from which she graduated summa cum laude) on the Mexican-Guatemala border, giving legal assistance to asylum-seekers. It is completely in keeping with her capacious commitment to service that, now that Marielle has fixed on doing criminal law work, she is wavering between being an AUSA or a Federal Defender.

With her keen intelligence, extraordinary writing ability, inspiring commitment to the public good, and personal discipline, I expect great things of Marielle. I am also confident that she would be an extraordinary law clerk. If there is anything else I can add, please give me a call.

Respectfully yours,

Daniel Richman

Dan Richman - drichm@law.columbia.edu - 212-854-9370

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to recommend Marielle Paloma Greenblatt for a position as your law clerk. I got to know Marielle well, first as a student in Lawyering for Change in the second semester of her first year. Her blog posts and personal autobiography demonstrated her ability to write beautifully in a reflective and expository vein. Her participation revealed a hunger for impact, a capacity for introspection and self-learning, and a deep commitment to the law as a vehicle for addressing society's toughest problems. Her performance in Lawyering for Change was so outstanding that I asked her to serve as a teaching assistant the following year. Marielle excelled in that role as well, becoming one of the most effective teaching assistants I have ever worked with in Lawyering for Change. I have no doubt that Marielle will be an outstanding law clerk. I recommend her with great enthusiasm.

Marielle stood out for her performance in class and on the weekly class blog. She asked terrific questions, often shaping the dialogue of many other students and participants. She was not afraid to raise issues that might be uncomfortable, or about which there was tremendous uncertainty or unfamiliarity. She brought a spirit of genuine inquiry and caring, along with a great sense of humor, to her inquiry. As result, Marielle was able to spark dialogue across people who disagree, and to push the class to address some of the hardest questions related to lawyering for change– how to address race, the relationship between incremental and transformative change, and how to balance doing well with doing good.

Marielle's written work also was outstanding. Her blogs were always on time, well written, and full of insight. She digested the readings and synthesized them in creative and interesting ways, and often identified the most interesting and important issues. Her posts often ignited dialogue with other students. Marielle's final written work placed her at the top of the class. For her final reflection, she brilliantly documented, synthesized, and marshaled the insights of the readings and the speakers. Her paper demonstrated a level of listening throughout the semester that was quite unusual, and an ability to integrate theory with on the ground experience. She asked really deep and challenging questions. She embraced her position as a first generation, bi-racial lawyer-to-be who would in her words from her final paper, "straddle positions and the cultural bilingualism mandatory for fluency in navigating between legalese and empathy, common-sense business acumen and erudite legal theory."

Marielle also excelled in the work she did with her project group for lawyering for change. She produced a terrific research report and bibliography entitled, "How the Torts System Entrenches Injustice Through Race-Based Economic Loss Calculations." Her product demonstrated the ability to identify a cutting edge and under-researched issue, outstanding research skills, the ability to synthesize information from multiple disciplines and sources, and a strong social justice commitment leading her to go far beyond what the assignment required.

I was so impressed with Marielle's work in Lawyering for Change that I asked her to serve as a teaching assistant the following year. Marielle was extraordinary in that role. She became a genuine thought partner, helping develop lesson plans, supporting student learning, trouble-shooting, and serving as ombudsman for the class. Her feedback about the class was so thoughtful and constructive, demonstrating a highly sophisticated understanding of the material and ability to figure out how to communicate and thorny ideas so that people could absorb them. I consulted her regularly to think through how best to engage students with different needs and learning styles, as well as to develop problems and examples that would connect the learning to students' interests and lives.

Marielle is a pleasure to work with. She is even-tempered, has a great sense of humor, and is both firm and kind. She works really well independently and knows when to ask questions. She takes responsibility with grace and authority, and also collaborates extremely well.

Finally, Marielle has clear and thoughtful reasons for wanting to clerk. Her interest in impact litigation, and in working in the criminal justice system reflect a long-standing commitment. I have no doubt that Marielle will bring tremendous energy, insight,

and hard work to her role as law clerk, and that she will make invaluable contributions to chambers. I highly recommend her. I would be happy to speak with you about Marielle if that will be helpful. I can be reached at 917-846-3502.

Sincerely,

Susan Sturm
Director, Center for Institutional and Social Change
George M. Jaffin Professor of Law and Social Responsibility

Susan Sturm - ssturm@law.columbia.edu - 212-854-0062

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to recommend Marielle Paloma Greenblatt (Columbia '21) for a clerkship in your chambers during the earliest available term. Ms. Greenblatt was a star student in my seminar on the American Bail System. She was by far the most capable and engaged student I have had in the seminar, and she deftly took on a writing project of unprecedented ambition. Ms. Greenblatt is a strong researcher and writer, a fantastic student, and a keen interlocutor. I am certain she will make a stellar clerk.

While most students content themselves with writing research papers from a few online sources or Westlaw cases, Ms. Greenblatt undertook tremendous efforts to interview commercial bail bondsmen about their practices and their reactions to proposed bail reforms in New Jersey and Pennsylvania, where she was based during our remote semester. The project required far more effort than could be rewarded with two credits. Ms. Greenblatt had to jump through numerous IRB hoops and attempt multiple approaches to bondsmen who were reluctant to speak to an outsider. The project required careful planning and investment from early on in the semester until the last course session (when most students only begin to plan their final papers). The result is an impressive window into the world of Pennsylvania suretyship and a set of methodological practices senior researchers would do well to emulate.

In my spring Federal Courts lecture course, Ms. Greenblatt stood out again for her thoughtful engagement and keen questions at office hours. She wrote a model exam answer on the possible remedies and roadblocks facing incarcerated populations at heightened risk in the pandemic. In seminar, Ms. Greenblatt was consistently the most prepared student, but she was careful to share discussion time with other students and refrain from showing off. My sense from students who have worked with her is that Ms. Greenblatt is highly respected among her peers as a collaborator and an organizer who leads by serving those around her.

While I do understand as a junior professor that superlatives like "best student" do not count for much, what I can say is that I was recently in the business of hiring clerks myself—in the chambers of Judge Lee H. Rosenthal of the Southern District of Texas and Judge Stephen F. Williams of the D.C. Circuit. Both judges had formidable, exacting standards for writing that was concise, efficient, and clear, and for clerks that were responsible, thoughtful, and engaging. By those standards, I would have leapt at the chance to hire Ms. Greenblatt, and I hope you will strongly consider her candidacy.

I am available by phone or e-mail at 505-609-3854 and krf2138@columbia.edu if you would like to discuss Ms. Greenblatt's application further.

Regards,

Kellen Funk

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WRITING SAMPLE

The following writing sample is an excerpt from the first draft of a decision written in 2023. It is an unedited piece of my own work. The parties' names and factual details have been changed to preserve the privacy of the litigants.

Plaintiffs Jixiang Wang and Mohamed Baloul (collectively, "Plaintiffs") bring this action against Waystar Royco Group Holding Limited ("Waystar" or "the Company"), Jennifer Majors, Desiree Zhou, and Marvin Wei (collectively, "Defendants"), pursuant to Section 10(b) and Section 20(a) of the Securities Exchange Act of 1934.[1] (*See* Consol. Am. Compl. ("CAC"), ECF No. 50.) Defendants moved to dismiss pursuant to Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP") and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u–4(b). (ECF Nos. 62–64.) Defendants' motion to dismiss is GRANTED in part and DENIED in part.

I. FACTUAL BACKGROUND

Plaintiffs bring this federal securities action on behalf of all investors (the "Class") who purchased or otherwise acquired Waystar American Depositary Shares ("ADSs") between June 29, 2020 and January 13, 2021, inclusive (the "Class Period"). (CAC ¶ 1.) During the Class Period, Jennifer Majors was a Waystar board member. (*Id*. ¶ 11.) Desiree Zhou served as Waystar's Chief Operating Officer ("COO"). (*Id*. ¶ 41.) Marvin Wei served as Waystar's Chief Financial Officer ("CFO"). (*Id*. ¶ 42.)

A. Waystar's Business

Waystar is an online retailer that operates multiple online marketplaces including Waystar.com. (*Id*. ¶ 2.) Waystar is headquartered in the People's Republic of China ("China" or "PRC"), and its ADSs trade on the New York Stock Exchange ("NYSE"). (*Id*. ¶¶ 4, 32.)

[1] This Court refers to Waystar, Wei, and Zhou's memorandum of law in support of their motion to dismiss as "Waystar Defs.' Br." (ECF No. 45); to Plaintiffs' memorandum of law in opposition to the Waystar Defendants' motion as "Pls.' Waystar Opp." (ECF No. 54); to Plaintiffs' opposition to Majors' memorandum as "Pls.' Majors Opp." (ECF No. 55); and to Majors' reply in support of her motion as "Majors Def. Reply" (ECF No. 71.)

Waystar's business is regulated by multiple PRC regulatory agencies, including the Department of Antitrust Regulation ("DAR"), which enforces China's anti-monopoly laws ("AML"). (*Id*. ¶ 4.) In November 2019, the DAR instructed Waystar and other internet companies that certain exclusivity practices violated PRC law. (*Id*. ¶¶ 4–7.) In June 2020, Waystar signed an agreement with the DAR pledging that it would "not force platform operators to conduct 'exclusive cooperation'" and would "not impose any unreasonable restrictions or make any unreasonable requirements on the selections of platforms by the operators." (*Id*. ¶ 8.) Plaintiffs allege that, despite this pledge and unbeknownst to investors, Waystar required merchant exclusivity throughout the Class Period. (*Id*. ¶ 9.)

In addition, Waystar owns a 26% equity interest in San Group Co., Ltd. ("San" or "San Group"), a financial technology company known for operating SanPay, an online payment platform. (*Id*. ¶ 11.) San was spun off from Waystar in 2010, but Waystar's 26% stake in the Group made Waystar San's "controlling shareholder" throughout the Class Period. (*Id*. ¶¶ 10–13.) Waystar also described San as "an unconsolidated related party of Waystar" in SEC filings. (*Id*. ¶ 274.) On July 20, 2020, Waystar announced in a 6-K that San Group was preparing for an initial public offering ("San IPO") in a joint listing on the Hong Kong Stock Exchange. (*Id*. ¶¶ 14–16.) In that announcement, Waystar noted that the IPO was expected to occur on November 25, 2020, but cautioned investors that "there can be no assurance as to if and when [the San IPO] will occur." (*Id*. ¶¶ 165, 274.) Waystar subscribed to buy $3.3 billion in additional San shares as part of the Ant IPO. (*Id*.)

On November 24, 2020, officials from two PRC regulatory agencies met with Majors and two San executives. (*Id*. ¶ 203.) That same day, PRC regulators released draft regulations which changed consumer lending rules applicable to Ant's online loan business. (*Id*. ¶ 201.) The

following day, Waystar announced that the San IPO had been suspended. (*Id*. ¶ 204.) Waystar's ADSs declined by 8% later that day. (*Id*. ¶ 24.)

On December 4, 2020, the DAR announced an investigation into Waystar's antitrust practices. (*Id*. ¶ 130.) Upon news of this announcement, the price of Waystar's ADSs fell approximately 13%. (*Id*. ¶ 131.) In May 2021, months after the Class Period had ended, the DAR's investigation concluded that Waystar had violated the AML and imposed a $1.3 billion penalty. (*Id*. ¶¶ 133, 142.) As part of its findings, the DAR concluded that Waystar had employed illegal merchant exclusivity practices since 2013. (*Id*. ¶¶ 136, 138–39.)

B. Alleged Misstatements

Plaintiffs allege that, during the Class Period, Defendants violated federal securities laws by making numerous misstatements about the San IPO (the "San claim") and about Waystar's antitrust risk and exclusivity practices (the "Exclusivity Practices claim") that artificially increased the stock price and eventually caused financial loss to the Class. (*Id*. ¶¶ 97–104.) These alleged misstatements and omissions occurred in Waystar's SEC filings and in San's pre-IPO filings.

For their Exclusivity Practices claim, Plaintiffs identify numerous statements as materially misleading, including disclosures that described Waystar's "prior" use of exclusive partnerships, when Waystar had continued to require merchant exclusivity unbeknownst to regulators and investors. Plaintiffs also identify as materially misleading statements which attributed Waystar's financial success to its "value proposition" to merchants, rather than disclosing that revenue growth was due, at least in part, to its continued exclusivity requirements. Plaintiffs also allege that Defendants' statement that Waystar believed in the legality of such practices was materially misleading. (*Id*. ¶ 32.) For their San claim, Plaintiffs allege that Waystar's disclosures and San's pre-IPO filings were materially misleading because they concealed material risks regarding San's ownership structure. (*Id*. ¶¶ 274–76.)

II. LEGAL STANDARDS

A. Standing Under Section 10(b)

To sue under Section 10(b), Plaintiffs must have "at least dealt in the security to which the prospectus, representation, or omission relates." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 747 (1975). "Under the purchaser-seller rule, standing to bring a claim under Section 10(b) is limited to purchasers or sellers of securities about which a misstatement was made." *Menora Mivtachim Ins. Ltd. v. Frutarom Indus. Ltd*., 54 F.4th 82, 84 (2d Cir. 2022) (citing *Blue Chip Stamps*, 421 U.S. at 723)). "Stockholders do not have standing to sue under Section 10(b) and Rule 10b–5 when the company whose stock they purchased is negatively impacted by the material misstatement of another company, whose stock they do not purchase." *Ontario Pub. Serv. Emps. Union Pension Tr. Fund v. Nortel Networks Corp*., 369 F.3d 27, 34 (2d Cir. 2004). "Section 10(b) standing does not depend on the significance or directness of the relationship between two companies. Rather, the question is whether the plaintiff bought or sold the securities about which the misstatements were made." *Frutarom*, 54 F.4th at 88.

B. Rule 12(b)(2) Lack of Personal Jurisdiction

The plaintiff has the burden of establishing personal jurisdiction over the defendant. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59 (2d Cir. 2012). To determine whether personal jurisdiction over a defendant exists, "a court may consider materials outside the pleadings, but must credit plaintiffs' averments of jurisdictional facts as true." *In re Stillwater Capital Partners Inc. Litig*., 851 F. Supp. 2d 556, 566–67 (S.D.N.Y. 2012). However, the court is neither required to "draw argumentative inferences in the plaintiff's favor," *Robinson v. Overseas Military Sales Corp*., 21 F.3d 502, 507 (2d Cir. 1994) (citation omitted), nor must it "accept as true a legal conclusion couched as a factual allegation." *Jazini v. Nissan Motor Co., Ltd*., 148 F.3d 181, 185 (2d Cir. 1998) (citation omitted). "In deciding a pretrial motion to dismiss for lack of

personal jurisdiction, the court has considerable discretion." *S.E.C. v. Straub*, 921 F. Supp. 2d 244, 251 (S.D.N.Y. 2013) (cleaned up).

Section 27 of the Exchange Act governs personal jurisdiction in securities cases and permits exercising personal jurisdiction to the extent permitted by the Fifth Amendment and requires minimum contacts be established with the United States as a whole, as opposed to the forum state. *S.E.C. v. Sharef*, 924 F. Supp. 2d 539, 544 (S.D.N.Y. 2013); 15 U.S.C. § 78 (a)(a). Thus, the court must consider whether exercising personal jurisdiction is consistent with "due process protections established under the United States Constitution." *Licci*, 732 F.3d at 168.

The due process analysis consists of two discrete components: "the minimum contacts inquiry and the reasonableness inquiry." *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 164 (2d Cir. 2010) (quotation marks omitted). Under the minimum contacts inquiry, courts "must determine whether the defendant has sufficient minimum contacts with the forum . . . to justify the court's exercise of personal jurisdiction." *In re Parmalat Sec. Litig*., 376 F. Supp. 2d 449, 453 (S.D.N.Y. 2005) (citing *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945)). For this inquiry, a court evaluates the "quality and nature" of the defendant's contacts with the forum. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). The court considers these contacts in totality, with the crucial question being whether the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" "such that [the defendant] should reasonably anticipate being haled into court there." *In re Braskem S.A. Sec. Litig*., 246 F. Supp. 3d 731, 767 (S.D.N.Y. 2017) (citations omitted). "Although a defendant may not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, jurisdiction is proper where the

contacts proximately result from actions by the defendant himself that create a substantial connection with the forum." *Straub*, 921 F. Supp. 2d at 253–54 (quoting *Burger King*, 471 U.S. at 480).

Once the court is satisfied that a defendant has sufficient contacts with the forum to justify the exercise of personal jurisdiction, it must then determine "whether the assertion of personal jurisdiction comports with 'traditional notions of fair play and substantial justice'—that is, whether it is reasonable to exercise personal jurisdiction under the circumstances of the particular case." *Chloé*, 616 F.3d at 164 (quoting *Int'l Shoe*, 326 U.S. 310 at 316). If the court determines that a defendant lacks the requisite contacts, it need not consider the reasonableness prong. *Metro. Life Ins. Co. v. Robertson-Ceco Corp*., 84 F.3d 560, 568–69 (2d Cir. 1996) (citation omitted).

C. Rule 12(b)(6) Failure to State a Claim.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must demonstrate "more than a sheer possibility that a defendant has acted unlawfully"; stating a facially plausible claim requires the plaintiff to plead facts that enable the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). The factual allegations pled must therefore "be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation omitted).

A district court first reviews a plaintiff's complaint to identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. The court then considers whether the plaintiff's remaining well-pleaded factual allegations, assumed to be true, "plausibly give rise to an entitlement to relief." *Id.* In deciding the 12(b)(6)

motion, the court must also draw all reasonable inferences in the non-moving party's favor. *N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, 709 F.3d 109, 119–20 (2d Cir. 2013).

D. Rule 9(b) Heightened Pleading Standard and the PSLRA.

Allegations of fraud, including securities fraud, must satisfy the heightened pleading requirements of FRCP 9(b) and the PSLRA. *ECA, Loc. 134 IBEW Joint Pension Tr. of Chicago v. J.P. Morgan Chase Co.*, 553 F.3d 187, 196 (2d Cir. 2009). Under Rule 9(b), a complaint alleging securities fraud must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). In particular, "the plaintiff must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 108 (2d Cir. 2012) (quotation omitted). Additionally, the PSLRA expands upon Rule 9(b) by requiring the plaintiff to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007) (citation omitted).

E. Section 10(b) of the Securities Exchange Act of 1934 and Corresponding Rule 10b–5(b).

Section 10(b) of the Exchange Act makes it unlawful to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe," 15 U.S.C. § 78j(b). Under Rule 10b–5(b), it is unlawful for any person to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading." 17 C.F.R. § 240.10b–5. To prevail on a Section 10(b) and Rule 10b–5 claim, a plaintiff must allege "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon

the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011) (quotation omitted). The materiality requirement requires a substantial likelihood that the disclosure of the omitted fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

F. Section 20(a) of the Exchange Act

Section 20(a) of the Exchange Act imposes liability on "[e]very person who, directly or indirectly, controls any person" directly liable under the Act. 15 U.S.C. § 78t(a). To establish a *prima facie* case of control person liability pursuant to Section 20(a), a plaintiff must allege "(1) a primary violation by the controlled person, (2) control of the primary violator by the defendant, and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud." *Carpenters Pension Tr. Fund of St. Louis v. DARclays PLC*, 750 F.3d 227, 236 (2d Cir. 2014) (quoting *ATSI Commc'ns*, *Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 108 (2d Cir. 2007)). Primary liability under Section 10(b) is a prerequisite to a control person liability claim. *See Rombach v. Chang*, 355 F.3d 164, 177–78 (2d Cir. 2004).

III. PLAINTIFFS LACK STANDING TO CHALLENGE STATEMENTS ABOUT SAN

Plaintiffs assert a claim against Waystar and Majors for alleged misstatements made in San Group's pre-IPO disclosures and in Waystar's SEC filings. (CAC ¶ 20.)

Plaintiffs concede that they did not purchase or sell Ant securities but maintain that they have standing to challenge disclosures about San because "San and Waystar are related companies" and "Waystar's value is directly linked to San's value." (Pls.' Majors Opp. at 16.) Defendants argue that this Circuit requires Plaintiffs to have been purchasers or sellers of securities

about which a misstatement was made to have standing to sue under Section 10(b) and move to dismiss for lack of standing under Rule 12(b)(1). (Majors Def. Reply at 8.)

Defendants are correct. The Second Circuit's decision in *Frutarom* makes clear that the purchaser-seller rule requires plaintiffs to have bought or sold the security about which a misstatement was made to have standing to sue under Section 10(b). *Frutarom*, 54 F.4th at 86. The challenged disclosures were not about Waystar—the company in which Plaintiffs purchased or sold stock. Instead, they related to San's IPO, business, and regulatory environment. (CAC ¶¶ 278–308); *see Frutarom*, 54 F.4th at 89 ("Plaintiffs did not purchase the securities about which misstatements were made, so they did not have standing to sue under Section 10(b) or Rule 10b–5.") While Ant and Waystar may have been "highly related," *Frutarom* makes clear that "Section 10(b) standing does not depend on the significance or directness of the relationship between two companies. Rather, the question is whether the plaintiff bought or sold the securities about which the misstatements were made." *Frutarom*, 54 F.4th at 88.

Plaintiffs therefore lack standing to sue Majors or Waystar based on alleged misstatements about San. Accordingly, Plaintiffs' San IPO claims against Majors and Waystar are dismissed for lack of standing.[2]

IV. THIS COURT LACKS PERSONAL JURISDICTION OVER MAJORS

To establish personal jurisdiction over Majors, this Court employs a two-step inquiry. First, this Court must determine whether there is a "statutory basis for exercising personal jurisdiction." *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 128 (2d Cir. 2013) (citation omitted). Second, this Court must consider whether exercise of personal jurisdiction over Majors is consistent with

[2] Because Plaintiffs' scheme liability claims under Rule 10b–5(a) and (c) were predicated on Waystar's liability for misstatements and omissions about San, those claims are likewise dismissed.

constitutional due process principles. The due process analysis has two discrete components: the 'minimum contacts' inquiry and the 'reasonableness' inquiry. *Chloé*, 616 F.3d at 164.

Plaintiffs identify a valid statutory basis to consider the exercise personal jurisdiction over Majors: Section 27 of the Exchange Act. "Under Section 27, there are three recognized bases for exercising jurisdiction over a foreign defendant: where the defendant does business in the forum, does an act in the forum,' or 'causes an effect in the forum by an act done elsewhere." *Braskem*, 246 F. Supp. 3d at 766–67 (citation and quotation marks omitted).

The determinative factor is whether exercise of personal jurisdiction over Majors would accord with constitutional due process. To satisfy minimum contacts, Plaintiffs must demonstrate that their claim "'arises out of, or relates to [Majors'] contacts with the forum . . . [and that she] purposefully availed [her]self of the privilege of doing business in the forum and could foresee being haled into court there.'" *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127 (2d Cir. 2002)); *Straub*, 921 F. Supp. 2d at 252.

Plaintiffs argue that Majors "engaged in conduct that was designed to violate United States securities regulations" in order to support finding minimum contacts. *Straub*, 921 F. Supp. 2d at 248. Plaintiffs' primary theory of liability is that Majors "has always controlled and continues to control Waystar" and caused Waystar to perpetrate a fraud aimed at deceiving U.S. investors.[3] (Pls.' Majors Opp. at 2, 10–11; CAC ¶ 313.) Specifically, Plaintiffs allege that (1) Majors was responsible for appointing Waystar's Board Members, (2) several Board Members were indebted

[3] Plaintiffs also contend this Court may exercise personal jurisdiction over Majors for failing to disclose information regarding the Ant IPO in Waystar's own filings. (Pls.' Majors Opp. at 1, 3.) As discussed above, *supra* Section III, Plaintiffs lack standing to challenge Waystar's disclosures regarding the San IPO because they were not purchasers or sellers of San securities.

to her, and (3) Majors was able to "seize licenses" to retain "substantial holdup leverage over Waystar[.]" (CAC ¶¶ 2–3, 28, 56, 239–40.)

Majors founded Waystar and served in several executive roles before announcing her retirement in 2019. (*Id.* at 2; CAC ¶ 54.) During the Class Period, Majors was a Waystar Board Member and a member of its Partnership, "a group of a few dozen employees with tremendous power over the company's board and leadership." (*Id*. ¶ 54 (citation omitted).) Plaintiffs argue that "by virtue of Majors' ownership interest," Majors had "the power to influence and control, and did influence and control, directly or indirectly, the decision–making of the Company, including the content and dissemination of the of the various statements which Plaintiffs contend are false and misleading." (*Id*. ¶ 404.)

Critical, however, is what Plaintiffs do not allege. Plaintiffs do not allege, concretely, that Majors "played *any* role in making, proposing, editing or approving" Waystar's public filings in the United States.[4] *See Braskem*, 246 F. Supp. 3d at 770 (no minimum contacts where complaint "does not allege, concretely, that [defendant] played any role in making, proposing, editing, or approving [company's] public filings in the United States.").

Plaintiffs emphasize Majors' involvement on Waystar's Board and on its Partnership committee, but it is well-established that "[a] person's status as a board member is not alone sufficient to establish jurisdiction." *Das v. Rio Tinto PLC*, 332 F. Supp. 3d 786, 802 (S.D.N.Y. 2018) (quotation omitted). "Indeed, absent any alleged role in preparing false financial statements[,] the exercise of jurisdiction . . . exceeds the limits of due process." *Id*. (quoting *Sharef*, 924 F. Supp. 2d at 548 (cleaned up)). "As various courts have held, a conclusory statement that a foreign defendant caused an issuer to making false and misleading filings is not enough to support

[4] As noted above, Plaintiffs lack standing to challenge Defendants' San-related statements. *See supra* Section III. Those statements thus cannot serve as basis for establishing personal jurisdiction over Majors.

personal jurisdiction." *Braskem*, 246 F. Supp. 3d at 770.

Plaintiffs' sweeping allegations regarding Majors' control over Waystar are insufficient to establish personal jurisdiction. *See Parmalat*, 376 F. Supp. 2d at 454 ("the Due Process Clause is made of sterner stuff than a mere allegation of control[.]"); *In re Aegean Marine Petroleum Network, Inc. Sec. Litig.*, 529 F. Supp. 3d 111, 136 (S.D.N.Y. 2021). These allegations are a "far cry" from concrete factual pleadings which allege "specific facts making the foreign defendant accountable for an issuer's allegedly actionable corporate statements." *Id*. (citing *Braskem*, 246 F. Supp. 3d at 769–70.)

Plaintiffs next argue that Majors is subject to personal jurisdiction "due to her misleading statements and deceptive acts that foreseeably affected U.S. shareholders." (Pls.' Majors Opp. at 9.) The Second Circuit relies on the "effects test" to determine whether it can exercise specific jurisdiction over a defendant whose "conduct that forms the basis of the controversy occurs entirely out–of–forum," and whose "only relevant jurisdictional contacts with the forum are therefore in-forum effects harmful to the plaintiff." *Tarsavage v. Citic Tr. Co., Ltd.*, 3 F. Supp. 3d 137, 145 (S.D.N.Y. 2014). "Pursuant to the effects test, 'the exercise of personal jurisdiction may be constitutionally permissible if the defendant expressly aimed its conduct at the forum.'" *Aegean*, 529 F. Supp. 3d at 135 (quoting *Tarsavage*, 3 F. Supp. 3d at 145) (citing *Licci*, 732 F.3d at 173). "[T]he fact that harm in the forum is foreseeable . . . is insufficient for the purpose of establishing specific personal jurisdiction over a defendant." *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 674 (2d Cir. 2013).

There is no support for the proposition that Majors directed her conduct toward the United States. To the extent that the complaint alleges that Majors engaged in a "scheme to defraud Chinese regulators" regarding the San IPO or Waystar's exclusivity practices, those actions were

entirely outside of the United States and were directed towards China. (CAC ¶ 360; Transcript of Oral Argument ("Tr."), ECF No. 81, at 55:19–22)); *Aegean*, 529 F. Supp. 3d at 137–38. Majors' role in the IPO or Waystar's fraudulent exclusivity scheme aimed at PRC regulators was therefore not "conduct expressly aimed at the United States." *Aegean*, 529 F. Supp. 3d at 138 (citing *Calder v. Jones*, 465 U.S. 783, 789 (1984)). Accordingly, Plaintiffs' claims against Majors are dismissed for lack of personal jurisdiction.[5]

V. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED SECURITIES FRAUD AGAINST WAYSTAR, WEI, AND ZHOU

A. Material Misstatements

"In order to state claims pursuant to section 10(b) of the Exchange Act and Rule 10b–5 promulgated thereunder, a plaintiff must allege, *inter alia*, that the defendant engaged in a material misrepresentation or omission." *Thesling v. Bioenvision, Inc*., 374 F. App'x 141, 143 (2d Cir. 2010) (citing *Operating Local 649 Annuity Trust Fund v. Smith DARney Fund Mgmt. LLC*, 595 F.3d 86, 92 (2d Cir. 2010)). The Exchange Act "requires that the complaint shall specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001) (quotation marks omitted). Plaintiffs cannot merely state that the statements are false or misleading, "they must demonstrate with specificity why and how" they are so. *Rombach*, 355 F.3d at 174. "The literal truth of an isolated statement is insufficient; the proper inquiry requires an examination of defendants' representations, taken together and in context." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 366 (2d Cir. 2010) (quotation marks omitted).

[5] Because this Court finds that Majors lacked sufficient minimum contacts with the United States, this Court has no occasion to consider the due process reasonableness factors.

Many of Plaintiffs' Exchange Act claims relate to the omission of material information, as opposed to an affirmative misstatement of fact. In contrast to a misstatement, "'an omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts.'" *Id.* (quoting *In re Time Warner Inc. Securities Litigation*, 9 F.3d 259, 267 (2d Cir. 1993)). "A fact is to be considered material if there is a substantial likelihood that a reasonable person would consider it important in [making investment decisions]." *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 518 (2d Cir. 1994). "[I]t bears emphasis that § 10(b) and Rule 10b–5(b) do not create an affirmative duty to disclose any and all material information." *Matrixx*, 563 U.S. at 44. "Disclosure is required . . . only when necessary 'to make statements made, in the light of the circumstances under which they were made, not misleading.'" *Id*. at 44 (quoting 17 C.F.R. § 240.10b–5(b)).

Plaintiffs allege that the following disclosures about Waystar's exclusivity practices were materially false or misleading:[6] (i) Waystar's statement describing its "prior" use of exclusivity arrangements (CAC ¶ 253; Pls.' Waystar Opp. at 1, 14–16); (ii) statements attributing Waystar's revenue growth to its value proposition for merchants, omitting its continued reliance on exclusivity (CAC ¶¶ 256, 261, 265; Pls.' Waystar Opp. at 19–20); (iii) Waystar's statement that it "believe[d] that our business practices do not violate anti-monopoly or unfair competition laws" ("belief statement") (CAC ¶ 255(b); Pls.' Waystar Opp. at 11); and (iv) Waystar's risk disclosures regarding antitrust risk. (CAC ¶¶ 253, 255; Pls.' Waystar Opp. at 17–19.)

Defendants contend that Waystar's exclusivity practices were well-known to investors and the public and had been "subject to public challenge for years." (Waystar Defs.' Mem. at 5–7.)

[6] Because Plaintiffs lack standing to challenge disclosures about San, *see supra* Section III, this Court has no occasion to consider whether those statements were materially false or misleading.

Defendants also assert that Waystar had disclosed to investors that its exclusivity practices were under scrutiny by PRC regulators. For example, in documents filed with the SEC during the Class Period, Waystar disclosed to investors that "[o]n several recent occasions . . . the DAR has indicated its view that . . . arrangements seen as exclusivity arrangements, may constitute violation of the anti-monopoly . . . laws. The DAR also indicated its intention of initiating investigations into these arrangements."[7] (Waystar Defs.' Mem. at 9.)

i. "Prior" Use of Exclusivity Practices Statement

Plaintiffs argue that Waystar's characterization of its "prior" and "narrowly deployed" use of exclusivity practices was materially misleading because Waystar was utilizing exclusivity practices which were "deeply engrained" when the statement was made. (CAC ¶ 255(e); Pls.' Waystar Opp. at 1, 14–15.) The challenged disclosure states that the AML "provides a private right of action" and that some of Waystar's "competitors, business partners and customers[] have [initiated] and may continue . . . initiating private litigation that targets our prior and current business practices, such as. . . our *alleged prior narrowly deployed exclusive partnerships*." (CAC ¶ 257 (emphasis added).) Defendants contend that Plaintiffs "misconstrue" the disclosure, which they argue was referring to absolute exclusivity practices, not the narrower traffic-for-exclusivity practices that the DAR concluded Waystar had engaged in. (Waystar Defs.' Mem. at 19.)

Plaintiffs are correct that a reasonable investor could plausibly believe that Waystar's description of its "prior" exclusivity practices meant that Waystar was no longer requiring exclusivity from merchants at all. *In re Alstom SA*, 406 F. Supp. 2d 433, 453 (S.D.N.Y. 2005) ("The omission of adequate disclosure affirmatively creat[ed] an impression of a state of affairs

[7] On a Rule 12(b)(6) motion to dismiss, courts may consider "legally required public disclosure documents filed with the [SEC], and documents possessed by or known to the plaintiff upon which it relied in bringing the suit." *Tongue v. Sanofi*, 816 F.3d 199, 209 (2d Cir. 2016).

that differ[ed] in a material way from the one that actually exist[ed], and therefore it is actionable.") (citation and quotation marks omitted). Similarly, a reasonable investor would be interested in knowing that Waystar continued to require exclusivity, and would view that fact, if known, as altering the "total mix" of information made available about Waystar's practices. *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988); *Time Warner*, 9 F.3d at 268.

Contrary to Defendants' assertion that Waystar had publicly defended its exclusivity practices and that their use was "widely covered," the statements Defendants identify were made months and years before Waystar's July 2020 disclosure describing its "prior" use of exclusivity arrangements. (Waystar Defs.' Mem. at 18–20; Tr. 50-14:21.) Further, Waystar had signed an agreement with the DAR in July 2020 pledging that it would "not force platform operators to conduct 'exclusive cooperation'" and would "not impose any unreasonable restrictions or make any unreasonable requirements on the selections of platforms by the operators." (CAC ¶ 8.) Defendants' disclosure therefore "affirmatively created an impression of a state of affairs" regarding exclusivity that differed materially from the reality that existed. *Alstom*, 406 F. Supp. 2d at 453. Plaintiffs have therefore plausibly alleged that Waystar's statement regarding its "prior" use of exclusivity partnerships was materially misleading.

ii. Growth and Revenue Statements

Next, Plaintiffs allege that Waystar's disclosures attributing revenue growth to its value proposition for merchants, rather than disclosing their continued reliance on merchant exclusivity practices, were materially false and misleading. (Pls.' Waystar Opp. at 19–20; CAC ¶¶ 256, 261, 265.) In a footnote, Defendants argue that Plaintiffs have not explained how Waystar's practices rendered these "general statements" false or misleading. (Waystar Defs.' Br. at 20, fn. 13.)

"[S]ecurities laws do not impose on corporations a general, free-standing duty to disclose uncharged illegal conduct." *In re Banco Bradesco S.A. Sec. Litig.*, 277 F. Supp. 3d 600, 661

(S.D.N.Y. 2017) (citing *Pontiac*, 752 F.3d at 184). However, "[e]ven when there is no existing independent duty to disclose information, once a company speaks on an issue or topic, there is a duty to tell the whole truth." *Meyer v. Jinkosolar Holdings Co*., 761 F.3d 245, 250 (2d Cir. 2014). "[A] duty to disclose can arise when a corporation puts the reasons for its success at issue, but fails to disclose that a material source of its success is the use of improper or illegal business practices." *Rosi v. Aclaris Therapeutics, Inc*., No. 19 Civ. 7118 (LJL), 2021 WL 1177505, at *15 (S.D.N.Y. Mar. 29, 2021) (quoting *DoubleLine Capital LP v. Odebrecht Fin., Ltd*., 323 F. Supp. 3d 393, 441 (S.D.N.Y. 2018)) (internal citation omitted). "[A] company's statements become actionable if the company attributes its success to a particular cause without also disclosing the unlawful activity that contributed to that success." *Das*, 332 F. Supp. 3d at 808.

Here, Plaintiffs argue that Waystar "put the source of its success at issue" when it made statements attributing Waystar's core commerce to merchant growth and retention but failed to disclose that part of its success was due to continued use of exclusivity practices. (Pls.' Waystar Opp. at 24–26.) In Plaintiffs' telling, "[h]aving chosen to speak about specific features of its business model" regarding merchant retention, Waystar "had an obligation to ensure its statements were both accurate and complete, even if it lacked an independent duty to discuss the information in the first place." *In re Inv. Tech. Grp., Inc. Sec. Litig*., 251 F. Supp. 3d 596, 612 (S.D.N.Y. 2017) (quoting *In re BioScrip, Inc. Sec. Litig*., 95 F. Supp. 3d 711, 727 (S.D.N.Y. 2015)) (internal quotation marks and citation omitted).

Plaintiffs have sufficiently alleged that Waystar's characterization of their "prior" use of "exclusive partnerships" rendered their financial statements on growth and merchant retention materially misleading. (CAC ¶¶ 256–57, 261–62). Taken together, a reasonable investor could conclude that Waystar had stopped requiring merchant exclusivity, and that its reported growth

was due to organic retention, not exclusivity. Once Waystar spoke on the issue, it had "a duty to tell the whole truth"—that these trends were due, at least in part, to the Company's ongoing, undisclosed use of merchant exclusivity. *Meyer*, 761 F.3d at 250. A reasonable investor would view that fact, if known, as altering the "total mix" of information available about Waystar's business. *Basic*, 485 U.S. at 232; *Time Warner*, 9 F.3d at 268.

iii. Belief Statement

In 2020, Waystar warned investors that "[a]lthough we believe that our business practices do not violate anti-monopoly or unfair competition laws . . . there can be no assurance that regulators will not initiate anti-monopoly investigations into specific business practices we have adopted." (CAC ¶ 253.) Plaintiffs argue that Defendants could not have honestly believed that its exclusivity practices were legal because Waystar had been warned by the DAR that such practices were illegal, had signed a commitment pledging that it would not require exclusivity, and nevertheless continued to require exclusivity. (Pls.' Waystar Opp. at 1, 11–12.) Plaintiffs emphasize that the DAR later determined that Waystar's exclusivity practices violated the AML and imposed a substantial fine. (CAC ¶¶ 10, 253.) Defendants contend that Waystar's disclosure is an inactionable statement of opinion, and that Waystar publicly defended its exclusivity practices because it genuinely believed in their legality. (Waystar Defs.' Mem. at 15–16.)

The Supreme Court has held that liability for making a false statement of opinion may lie if: (1) "the speaker did not hold the belief she professed"; (2) "the supporting fact [the speaker] supplied were untrue"; or (3) "the speaker omits information whose omission makes the statement misleading to a reasonable investor." *Tongue*, 816 F.3d at 209–10 (quoting *Omnicare, Inc., v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 185–87, 195 (2015). "In determining whether a statement of opinion is misleading based on a failure to disclose facts underlying the opinion, "[t]he core inquiry is whether the omitted facts would 'conflict with what

a reasonable investor would take from the statement itself.'" *Id*. (quoting *Omnicare*, 575 U.S. at 189). "To make this showing, a plaintiff must identify particular (and material) facts going to the basis for the defendant's opinion." *Inv. Tech.*, 251 F. Supp. 3d at 618 (citing *Omnicare*, 575 U.S. at 189) (cleaned up). These may include "knowledge [the defendant] did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Omnicare*, 575 U.S. at 194. "In other words, when a statement of opinion implies facts or the absence of contrary facts, and the speaker knows or reasonably should know of different material facts that were omitted, liability under Rule 10b–5 may follow." *Abramson v. Newlink Genetics Corp*., 965 F.3d 165, 175 (2d Cir. 2020). The Second Circuit has noted that the Supreme Court's example of an issuer's statement of belief that its conduct is lawful is "particularly instructive," because "[s]uch a statement does not imply that the issuer's conduct is, in fact, lawful, but only that the issuer has conducted a meaningful inquiry and has a reasonable basis upon which to make such an assertion." *Tongue*, 816 F.3d at 214.

Here, Plaintiffs emphasize that Waystar omitted the critical context that it was continuing to employ certain exclusivity practices despite contrary representations to investors and regulators. Plaintiffs further argue that Defendants' omission of that material fact rendered their opinion statement materially misleading and actionable under *Omnicare*.

While Waystar disclosed the regulatory warning it had received and cautioned that investigatory action was possible, it omitted the material fact that it was not in compliance with the commitment pledge it had signed, nor with the representation it made to investors regarding its "prior" use of exclusivity. The opinion statement is therefore plausibly alleged to be misleading when read fairly and in context. *Omnicare*, 575 U.S. at 189. Moreover, Waystar's continued use of exclusivity practices, contrary to its public representations and commitments, indicates that

Defendants may not have a reasonable basis upon which to assert that their conduct was legal. *Tongue*, 816 F.3d at 214. Plaintiffs have therefore plausibly alleged that Waystar's statement regarding its belief in the legality of its exclusivity practices was materially false or misleading.

[**Subsequent portions of the draft have been omitted from this sample. The full draft is available upon request**].

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SECONDARY WRITING SAMPLE

The following writing sample is an excerpt of the argument section of a legal brief written for a moot court competition in 2019. It is an unedited piece of my own work. The brief, addressed to the Supreme Court of the United States, concerns the asylum claim of petitioner Ms. Leila Marcos, a native of the fictional island nation of Basag and a member of the Isda-Timog ethnic minority. Ms. Marcos' asylum claim is based on several instances of sexual harassment and assault by guards employed by Life Inc., a private corporation assigned full control of Basag's water resources by a government contract.

In the excerpt, I contend that the fictional United States Court of Appeals for the Thirteenth Circuit correctly adopted the disfavored group analysis test in evaluating whether Ms. Marcos adequately demonstrated a well-founded fear of persecution. I argue that the disfavored group analysis is a valid approach to determine an asylum applicant's well-founded fear because it is consistent with federal asylum law as codified in federal immigration regulations: demonstrating individualized risk ("individualized risk") and demonstrating a pattern or practice of persecution against similarly situated individuals ("pattern or practice"). I argue that, by using a sliding scale to balance an applicant's individualized risk against their group risk, the disfavored group analysis recognizes that modern forms of persecution may not fit neatly into either the individualized risk or the pattern or practice category. I conclude by arguing that the disfavored group analysis approach recognizes that a more flexible sliding scale approach may be necessary to ensure that meritorious applicants are granted asylum into the United States.

ARGUMENT

On appeal, questions of law decided by the Bureau of Immigration Appeals ("B.I.A.") and the Immigration Judge ("IJ") are subject to *de novo* review. *Vitug v. Holder*, 723 F.3d 1056, 1062 (9th Cir. 2013). The first issue presented here—whether this Court should affirm the Thirteenth Circuit's use of the disfavored group analysis—is a question of asylum law and is reviewed *de novo*. *Romero-Mendoza v. Holder*, 665 F.3d 1105, 1107 (9th Cir. 2011).

The second issue on appeal—whether Ms. Marcos sufficiently demonstrates a well-founded fear of future persecution—is a factual finding to be reviewed under the more deferential "substantial evidence" standard. *Kotasz v. I.N.S.*, 31 F.3d 847, 851 (9th Cir. 1994); *Oryakhil v. Mukasey*, 528 F.3d 993, 994 (7th Cir. 2008). The substantial evidence standard grants deference to factual findings, and reversal is appropriate only where "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

I. THE THIRTEENTH CIRCUIT PROPERLY ADOPTED THE DISFAVORED GROUP ANALYSIS TO ESTABLISH MS. MARCOS'S WELL-FOUNDED FEAR OF PERSECUTION.

Under the Immigration and Nationality Act of 1965 ("INA"), Ms. Marcos must show that she is unwilling or unable to return to her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). In making her claim for asylum, Ms. Marcos seeks to establish a well-founded fear of future persecution. Courts have defined persecution as "[T]he infliction of suffering or harm upon those who differ . . . in a way regarded as offensive." *Singh v. I.N.S.*, 94 F.3d 1353, 1358 (9th Cir. 1996).

Ms. Marcos has established that she has a well-founded fear of future persecution through use of the disfavored group analysis, which was adopted by the Thirteenth Circuit below. In so holding, the Thirteenth Circuit properly recognized the disfavored group analysis as a valid method to assess an applicants' asylum eligibility. Courts employing the disfavored group analysis evaluate an applicant's showing of individualized risk of future persecution alongside group-based risk through the use of a sliding scale, a practice that is consistent with federal immigration regulations as codified in 8 C.F.R. § 1208.13(b)(2)(iii).

In addition to the Thirteenth Circuit, a number of courts across the United States have adopted the disfavored group analysis approach, including the Fourth, Eighth, and Ninth Circuits. These courts have recognized that the disfavored group analysis prescribes an equivalent burden of proof standard for asylum applicants. *See Tampubolon v. Holder*, 598 F.3d 521, 524 (9th Cir. 2010); *Chen v. I.N.S.*, 195 F.3d 198 (4th Cir. 1999); *Makonnen v. I.N.S.*, 44 F.3d 1378 (8th Cir. 1995).

A. The disfavored group analysis is a valid basis for establishing an asylum applicant's well-founded fear of persecution, because it is consistent with 8 C.F.R. § 1208.13(b)(2)(iii) and prescribes an equivalent burden of proof standard for asylum applicants.

Courts employing the disfavored group analysis evaluate whether an asylum applicant has established an objectively reasonable and well-founded fear of future persecution by balancing the applicant's individualized risk against a group-based fear of persecution. In order to establish a well-founded fear of persecution, Ms. Marcos must show that her fear is both subjectively genuine and objectively reasonable. *See Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 654 (8th Cir. 2007); *Jibril v. Gonzales*, 423 F.3d 1129, 1133 (9th Cir. 2005). Ms. Marcos may satisfy her burden of demonstrating objective reasonableness "by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution." *Ladha v. I.N.S.,* 215 F.3d 889, 897 (9th Cir. 2000) (quoting *Duarte de Guinac v. I.N.S.,* 179 F.3d 1156, 1159 (9th Cir. 1999)).

Critically, Ms. Marcos is not required to show that her risk of future persecution is probable or even likely. The Supreme Court has held that "even a ten percent chance that the applicant will be persecuted in the future is enough to establish a well-founded fear." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

To meet her burden, Ms. Marcos can demonstrate either that she has an individualized risk of being singled out for persecution or that there is a pattern or practice of persecution of a group of persons similarly situated to her. 8 C.F.R. § 1208.13(b)(2)(iii). Traditionally, an asylum applicant is required to "provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution." *Id*.

Under the pattern or practice standard, an asylum applicant may demonstrate their objectively reasonable well-founded fear by showing that there is a "pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1208.13(b)(2)(iii)(A). In meeting their burden, the applicant must show their "inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable." *Id.* § 1208.13(b)(2)(iii)(B). The bar for establishing a pattern or practice of persecution is high—circuit courts have held that the persecution must be "systemic, pervasive, or organized." *Diaz-Garcia v. Holder*, 609 F.3d 21, 29 (1st Cir. 2010); *Raghunathan v. Holder*, 604 F.3d 371, 377 (7th Cir. 2010).

A number of courts have recognized that the "systemic, pervasive, or organized" threshold for establishing a pattern or practice of persecution poses continuing challenges for asylum applicants. *Salim v. Holder*, 728 F.3d 718, 719 (7th Cir. 2013); *Knezevic v. Ashcroft*, 367 F.3d

1206, 1212 (9th Cir. 2004). The bar for establishing a well-founded fear of future persecution by means of a pattern or practice is difficult to meet in part because "every member of a group that faces per se persecution is a refugee eligible for a discretionary grant of asylum" without the need to show an individualized risk of persecution. *Mitreva v. Gonzales*, 417 F.3d 761, 765 (7th Cir. 2005). In the decades since the pattern or practice regulation was adopted, courts have found very few instances that rise to the level of establishing a per se well-founded fear for every member of the group as a pattern or practice of persecution. *See Ahmadshah v. Ashcroft*, 396 F.3d 917, 921 (8th Cir. 2005) (finding a pattern or practice of sentencing Christians to death in Afghanistan); *Eduard v. Ashcroft*, 379 F.3d 182, 192 (5th Cir. 2004) (finding pattern or practice of persecution against Christians in Indonesia). As a result, many asylum applicants may be unable to show a well-founded fear of persecution based exclusively on being singled out for persecution or solely on group-based persecution, but may still maintain an objectively reasonable well-founded fear based on a combination of these two factors.

The disfavored group analysis as articulated by the Ninth Circuit recognizes that the realities of persecution around the world may not fall neatly into an established means of showing that a given asylum applicant has an objectively reasonable fear. While members of an oppressed group "are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk." *Kotasz*, 31 F.3d at 853. To establish membership in a disfavored group not subject to systemic persecution, reviewing courts look to:

> (1) the *risk level of membership in the group* (i.e., the extent and the severity of persecution suffered by the group) and (2) the *alien's individual risk level* (i.e., whether the alien ... is more likely to come to the attention of the persecutors making him a more likely target for persecution).

Mgoian v. I.N.S., 184 F.3d 1035 (9th Cir. 1999) (emphasis added).

Courts adopting the disfavored group analysis approach define a disfavored group as "a group of individuals in a certain country or part of a country, all of whom share a common, protected characteristic, many of whom are mistreated, and a substantial number of whom are persecuted" but who are "not threatened by a pattern or practice of systematic persecution" as a whole. *Wakkary v. Holder,* 558 F.3d 1049, 1064 (9th Cir. 2009) (quoting *Tampubolon v. Holder*, 598 F.3d 521, 524 (9th Cir. 2010)). The disfavored group analysis is an "evidentiary concept" that applies when a petitioner attempts to show that they will be individually singled out for persecution. *Tampubolon*, 598 F.3d at 524.

Critically, unlike the pattern or practice method, the disfavored group analysis always requires a showing of individualized risk to demonstrate the likelihood that a particular asylum applicant will experience future persecution. *Wakkary*, 558 F.3d at 1051. As a result, the disfavored group approach narrows the pool of potential asylum applicants to those who are both members of a disfavored group *and* who have demonstrated individualized, targeted risk. *See Salim v. Lynch*, 831 F.3d 1133, 1140 (9th Cir. 2016) (holding that "membership in a disfavored group is not by itself sufficient to demonstrate eligibility for asylum"). Courts that have adopted the disfavored group analysis test have held that the risk of membership in a group "can rise to the level required for establishing a well-founded fear of persecution … because an individual is a member of a certain element of the group that is itself at greater risk of persecution than is the membership of the group as a whole." *Kotasz*, 31 F.3d at 848.

Courts have utilized a sliding scale approach to balance group membership and individual risk, where "the more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution needs to be." *Mgoian*, 184 F.3d at 1035; *see also Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004); *Kotasz*, 31 F.3d at 853. This approach utilizes both

methods of analyzing an objective fear by balancing individualized risk against group-based fear of persecution as applied in the pattern or practice method of analysis. In application, the sliding scale approach recognizes the reality of how varied persecution may be in practice around the world, and that a combination of both factors may more accurately reflect applicant's cases.

The disfavored group analysis, by recognizing the relevance of both individualized risk and group-based risk, is consistent with how both the regulation itself and asylum law as a whole interpret a well-founded fear of persecution. When Congress passed The Refugee Act of 1980, it delegated criteria-setting authority to the Attorney General to establish regulations and procedures necessary to establish the adjudication of asylum claims. Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,675 (July 27, 1990). The Immigration and Naturalization Services ("I.N.S.") subsequently promulgated methods of establishing a well-founded fear consistent with the Act. *Id*. at 30,678.

In discussing the adoption of its group-based risk analysis, the I.N.S. stated only that "it is not necessary to prove [an asylum applicant] would be singled out if he can establish that there is a pattern or practice of persecuting the group of persons similarly situated, and that he can establish inclusion in/identification with such group." *Id*. The I.N.S.'s statement affirms that applicants who have established a pattern or practice of persecution do not need to show individualized risk. However, the explanation does not prohibit or disclaim an applicant's ability to establish a well-founded fear of future persecution using a combination of both individual and group factors. In addition to being consistent with I.N.S. regulations, an analysis that evaluates both factors serves to further the two guiding principles of the regulation: "A fundamental belief that the granting of asylum is inherently a humanitarian act … and a recognition of the essential need for an orderly and fair system for the adjudication of asylum claims." *Id*. at 30,675. The disfavored group analysis

Applicant Details

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Contact Phone Number	**9705601881**

Applicant Education

BA/BS From	**Brigham Young University**
Date of BA/BS	**December 2007**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 22, 2011**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law and Politics**
Moot Court Experience	**Yes**
Moot Court Name(s)	**William Lile Minor Moot Court Competition**

Bar Admission

Admission(s)	**Utah, Virginia**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Specialized Work Experience	**Appellate, Bankruptcy**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jason Greene

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June 28, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Potter Stewart United States Courthouse
100 East Fifth Street
Cincinnati, OH 45202

Dear Judge Davis,

I am writing to express my sincere interest in a term law clerk position in your chambers for the 2024-2025 term. I am currently serving as a term clerk for The Honorable Judge Clark Waddoups, Senior District Court Judge in the United States District Court for the District of Utah, a position I have held since January 2022. This is my second time working with Judge Waddoups, having also clerked in his chambers following my graduation from the University of Virginia Law School in 2011. Working as a law clerk for Judge Waddoups has been the highlight of my career to this point, and I know a clerkship in your chambers would only serve to further enhance my experience working for the judiciary and will provide me with additional useful skills as I continue to pursue my career goals. I would be available to begin a clerkship in your chambers any time in 2024.

After finishing my initial clerkship with Judge Waddoups in 2012, I worked in private practice as a commercial litigator at Anderson & Karrenberg, P.C., a mid-sized litigation boutique in Salt Lake City, Utah. As a young lawyer at Anderson & Karrenberg, I was quickly given the opportunity to engage in significant legal work in a wide range of subject matter areas, as reflected in my résumé. I have briefed and argued in support of successful dispositive motions in both federal and state court and negotiated favorable settlements for several clients. While in private practice, I also had the opportunity to work on multiple appeals before both the Tenth Circuit and Utah appellate courts, including as primary counsel in a case where I successfully briefed and argued an appeal to the Utah Court of Appeals.

In addition to the legal skills I developed as an attorney at Anderson & Karrenberg, I also had the opportunity to develop leadership skills at the firm when I was invited to become a shareholder in 2017. As a shareholder, I was involved in the firm's management and in supervising and mentoring newer attorneys.

Like my clerkship with Judge Waddoups, my time at Anderson & Karrenberg was tremendously rewarding and successful. After working as a litigator at the trial court level for nearly ten years, however, I decided to take my career in a different direction. While I enjoyed my experience as a trial lawyer immensely, I have come to believe that my skills and interests are more suited to appellate litigation and hope to eventually pursue a career in that specialty. When the opportunity to clerk for Judge Waddoups presented itself for a second time, I saw it as a great vehicle to assist me in

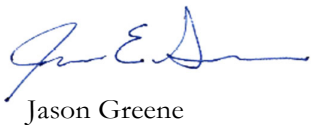
making that pivot. And I know that having the opportunity to clerk in your chambers will also help in that pursuit.

I am very enthusiastic about the prospect of working in your chambers and am available to discuss my candidacy with you at your convenience. Enclosed with this application is my résumé, transcripts, writing samples, and three letters of recommendation. My first letter of recommendation is from Judge Waddoups, for whom I am currently clerking. He has also agreed to be a reference for me and can be reached at (801) 534-6600 if you have any questions regarding my qualifications. My second letter of recommendation comes from Ms. Heather Sneddon, who was my mentor, and later partner, at Anderson & Karrenberg. Ms. Sneddon and I worked together on several matters throughout my time at Anderson & Karrenberg and she is very familiar with my work. She has also agreed to be a reference for me and can be reached at (801) 560-8932. My final letter of recommendation is from Mr. Eric Davenport, general counsel for Holmes Homes, Inc. I represented Holmes Homes in multiple cases during my time at Anderson & Karrenberg and, as a result, Mr. Davenport is also very familiar with my work. He is also happy to speak with you at your convenience and can be reached at (801) 979-5816.

If you have any further questions or need additional information for me, feel free to contact me at any time.

Thank you for your time and consideration.

Respectfully,



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EXPERIENCE

THE HONORABLE CLARK WADDOUPS, United States District Court, District of Utah

Judicial Law Clerk — *May 2012 – August 2012 & January 2022 – Present*
Fellowship Law Clerk — *September 2011 – May 2012*

- Confer with federal district judge regarding decisions in both civil and criminal actions
- Draft legal opinions, bench memoranda, and jury instructions
- Engage in extensive legal research and analysis
- Observe courtroom proceedings including a jury trial, evidentiary hearings, and several motion hearings

ANDERSON & KARRENBERG, P.C. — *Salt Lake City, Utah*

Shareholder — *January 2017 – December 2021*
Associate Attorney — *September 2012 – December 2016*

Represented both plaintiffs and defendants in federal and state court in a wide variety of complex commercial disputes, including cases involving software copyright infringement, trade secret misappropriation, consumer class actions, trademark infringement and false advertising, breaches of fiduciary duty, residential and commercial construction defects, HOA management, natural resource extraction and sales, legal malpractice, and fraud. Experiences and accomplishments include:

- Represented Salt Lake County in public nuisance lawsuit brought against nation's largest manufacturers and distributers of opioids
- Successfully briefed and argued against dismissal and summary judgment in nationwide consumer class action against large manufacturer and retailer of hardwood smoking pellets
- Successfully presented oral argument and briefing to Utah Court of Appeals in favor of affirming judgment precluding foreclosure of clients' home
- Researched and drafted key motions and memoranda as member of litigation team pursuing successful federal consumer fraud class action against one of nation's largest trucking companies that resulted in settlement valued at nearly $100 million
- Obtained multiple dismissals and an award of attorney's fees in civil RICO cases seeking recovery of "tens of millions of dollars"
- Reached favorable settlement on behalf of software company client pursuing secondary copyright infringement claims in federal court
- Obtained summary judgment in favor of general contractor clients in multiple multi-tiered construction defect actions seeking more than $37 million in aggregate damages
- Argued multiple significant, dispositive motions in state and federal court
- Participated in nearly all stages of litigation including pleading, initial disclosures, written discovery, taking depositions, document review, motion practice, pre-trial disclosures, trial preparation, and appeal

OFFICE OF GENERAL COUNSEL, University of Virginia

Legal Intern/Research Assistant *June 2010 – March 2011*

- Revised and updated policy on research misconduct
- Researched and wrote about various issues relating to higher education law, including copyright and fair use, independence of non-profit support foundations, and civil rights

PROFESSOR GEORGE COHEN, University of Virginia School of Law

Research Assistant *May 2009 – October 2009*

- Researched legal scholarship in areas of contract interpretation, law and economics, and legal ethics
- Helped update Professor Cohen's textbook, *The Law & Ethics of Lawyering* (2010)

EDUCATION

UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia

Juris Doctor *May 2011*

- *Journal of Law & Politics*, Production Editor
- William Lile Minor Moot Court Competition, Participant
- J. Reuben Clark Law Society, Student Chapters Board, Chair of Membership/Technology
- Rex. E. Lee. Law Society, Vice President
- Action for a Better Living Environment (ABLE), Director of Tutoring

BRIGHAM YOUNG UNIVERSITY, Provo, Utah

Bachelor of Arts, Economics and Political Science *December 2007*

- Graduated *magna cum laude*
- Dean's List (4.0 GPA for one or more semesters)

PROFESSIONAL AFFILIATIONS

- Utah State Bar Litigation Section, *Executive Committee Member* (June 2017-July 2021)
- Utah State Bar Leadership Academy, *Participant* (2019)
- The Aldon J. Anderson American Inn of Court, *Master of the Bench*

BAR ADMISSIONS

- Utah State Bar, 2012
- Virginia State Bar, 2011 (inactive)

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Jason Greene

Date: June 28, 2011
Record ID: jg6hd

Beginning with the fall semester of 1997, the School of Law established a grading mean of B+ (3.3). From that date forward, a student whose grades are cumulatively at or near a 3.3 grade point average would be ranked about in the middle of the class. A grade point average of 3.48, for example, represents distinguished work and would be ranked in the top 25 percent of the class.

The following is a list of law and selected non-law course work completed by the above-named student. Credits earned, grades awarded, and instructor names are also shown.

THIS IS NOT A TRANSCRIPT. FOR CAREER SERVICES PURPOSES ONLY.

		FALL 2008			
LAW	6000	Civil Procedure (A,K)	4	B+	Collins,Michael G
LAW	6002	Contracts (A)	4	A	Cohen,George M
LAW	6003	Criminal Law (A,B,I)	3	B+	Coughlin,Anne M
LAW	6004	Legal Research & Writng(A)(Yr)	1	S	Riley,Margaret F
LAW	6007	Torts (A,B,F)	4	A	Abraham,Kenneth S
		SPRING 2009			
LAW	6001	Constitutional Law (A,I)	4	A-	Ryan,James Edward
LAW	6104	Evidence	4	B+	Mitchell,Paul Gregory
LAW	7030	Family Law	3	A-	Coughlin,Anne M
LAW	6004	Legal Research & Writng(A)(Yr)	1	S	Stewart,Sarah
LAW	6006	Property (A,G)	4	B	Leslie,Douglas L
		FALL 2009			
LAW	7005	Antitrust	3	B	Nachbar,Thomas B
LAW	6109	Corporations (Law & Business)	4	A	Geis,George Samuel
LAW	6105	Federal Courts	4	B+	Collins,Michael G
LAW	7071	Professional Responsibility	2	B+	Hylton,Joseph G
		SPRING 2010			
LAW	6100	Accounting/Financial Statemnts	2	A	Broome,Oscar W
LAW	7646	Advisng the Board of Directors	1	A-	Steele,Myron Thomas
LAW	9069	Antitrust Review of Mergers	3	B	Fullerton,Lawrence R
LAW	6101	Corporate Finance	2	B+	Geis,George Samuel
LAW	6106	Federal Income Tax	4	C+	Yin,George K
LAW	7043	Insurance	3	A-	Abraham,Kenneth S
		FALL 2010			
LAW	7014	Conflict of Laws	2	A-	Collins,Michael G
LAW	7009	Criminal Procedure Survey	4	B+	Bowers,Josh
LAW	8651	Emerg Growth/Venture Captl:P&P	2	B+	Lincoln,Michael Robert
LAW	7653	Leadership and Team Management	1	B+	Donovan,Jim
LAW	8018	Trusts and Estates	3	B+	Morley,John D
		SPRING 2011			
LAW	7669	A Brief Intro Captl Mrkts (SC)	1	A-	Cory,Charles Robinson
LAW	8009	Copyright Law	3	A-	Sprigman,Christopher Jon
LAW	7641	Corporate Strategy (SC)	1	B+	Donovan,Jim
LAW	7103	Law and Education	3	B+	Ryan,James Edward
LAW	7062	Legislation	3	A-	Nelson,Caleb E
LAW	7102	Religious Liberty	3	A-	Laycock,H Douglas

HMS LAW

564 E 4TH Avenue, Salt Lake City, UT 84103 || 801.560.8932 || heather.m.sneddon@hmslaw.co

June 12, 2023

To Whom It May Concern:

I am writing this letter to wholeheartedly recommend Jason Greene for a position as an appellate clerk. I had the privilege of working closely with Jason for nearly 10 years when I was a shareholder and later the president of Anderson & Karrenberg, P.C., and I can confidently attest to his exceptional qualities and outstanding abilities as an attorney, as a true analytical thinker, and as a human being.

In the time I have known and worked with Jason, he consistently demonstrated remarkable diligence, dedication, and an unwavering commitment to his work. I relied heavily on him as my go-to on nearly every case I had because he was, without a single doubt, the best and most reliable. His tireless work ethic and meticulous attention to detail consistently set him apart from any other junior lawyer I ever worked with, and in truth, from most senior lawyers as well. Jason's ability to delve deeply into complex legal matters, research and analyze them both thoughtfully and comprehensively, and present well-reasoned arguments and conclusions, is truly remarkable. His thorough understanding of the nuances of the law – in really any case – allows him to navigate intricate legal issues with care, while his analytical skills enable him to provide practical and balanced solutions.

Jason's reliability and sense of responsibility are unparalleled. He consistently met deadlines and took ownership of tasks (and cases) during our many years working together, ensuring that everything was executed with the utmost professionalism, precision, and timeliness. Regardless of the challenges he encountered at our boutique commercial litigation firm, Jason always maintained a composed and level-headed approach, demonstrating his ability to handle high-pressure and high-stress situations with grace and poise.

One particular matter comes to mind: an extremely challenging, "bet-the-company" kind of national class action case in which Jason and I, together with lawyers from a few other firms nationwide, represented the named plaintiffs and class asserting claims for fraudulent misrepresentation and violations of consumer protection statutes against a prominent trucking company in the U.S. District Court for the District of Utah. The class certification briefing alone, not to mention the many dispositive motions and questions regarding administration of the class, were – without a doubt – the most difficult of my nearly 20-year career by a factor of at least ten.

Having won the hard-fought battle for class certification on behalf of the class, the parties were at odds as to whether the notice to be sent to the class could be "opt-out" consistent with Federal Rule of Civil Procedure 23, or whether it must be "opt-in" as potentially required by the Utah Consumer Sales Practices Act. During oral argument on the issue, the district judge appeared to be leaning toward an "opt-in" class based on his (incorrectly, we believed) reading of a more recent case from the U.S. Court of Appeals for the Tenth Circuit. Through dozens of pages of dense, supplemental analysis and briefing on the issue that we submitted to the district court, heavily researched and written almost exclusively by

Jason, in which he expounded on the history of the *Erie* Doctrine, the Federal Rules Enabling Act, and the applicable caselaw, we successfully persuaded the district judge that despite the conflicting language in the Utah state statute, Federal Rule of Civil Procedure 23 still applied such that the class notice would be "opt-out." An extraordinary win for our clients and the class achieved through Jason's incredible work.

Beyond his remarkable professional abilities, Jason is also an absolute pleasure to work with. He is easy going and affable. Quiet yet confident. His interpersonal skills, integrity, and genuine empathy are beyond reproach and make him an invaluable asset and team member.

I could not recommend Jason more highly. I have no doubt that he will continue to achieve great success in his career and be a truly invaluable addition to any judge's team of clerks fortunate enough to have him.

Please feel free to contact me should you require any further information or clarification. I am more than happy to provide additional insights into Jason's abilities and qualifications.

Sincerely,

Heather M. Sneddon

UNITED STATES DISTRICT COURT
United States Courthouse
351 South West Temple, Room 9.420
Salt Lake City, UT 84101
(801) 524-6600

June 7, 2023

Judge Clark Waddoups
United States District Judge

To Whom It May Concern:

Re: Recommendation for Jason Greene

Jason Green has worked as a law clerk in my chambers from January 2022 to the present. Prior to his most recent work as my law clerk, Jason worked for me as a Judicial Law Clerk and a Fellowship Law Clerk from September 2011 to May 2012 and May 2012 to August 2012. Jason does excellent work and provides strong support for the cases assigned to me.

My practice is to assign motions and other legal issues that are presented to the court to the assigned clerk to review and make a recommendation prior to oral argument. For some cases, I ask my clerks to prepare a bench memorandum before the argument. At other times, I ask them to give me oral advice. After oral argument, we discuss the case and the proposed resolution and then I often ask my clerks to draft proposed memorandum decisions and orders for me to review and finalize. Jason has always been exceptionally well prepared. His written work is well done, and he clearly explains the issues and his insight on how the case should be resolved. He has very strong research and analytical skills. Because Jason had almost ten years of experience as a practicing lawyer, representing clients in a variety of civil cases, when he returned as my law clerk, he was able to immediately understand the practical reality of the legal issues and the complexity presented by the cases. His experience has been extraordinarily helpful to me in resolving the often difficult issues presented to me for decision.

The cases we are assigned, both civil and criminal, present very difficult legal and policy issues. Jason has demonstrated that he understands the issues presented and the arguments made by counsel. Based on his prior experience and intellectual grasp of the issues, Jason has provided me with creative and well thought out solutions to difficult problems. His written work is always well done. His bench memoranda are concise and address the critical issues to be resolved. Jason has the ability to ferret out the important facts and legal arguments, while dismissing arguments that will not impact or control the decision. Jason has strong research skills and is able to provide the important precedents and controlling law that I need to prepare for oral argument and ultimately to resolve the case.

Jasen is a self-starter and has always provided me with the information I need well in advance of when I need it. Indeed, he has trained himself to review the calendar and anticipate the support I will need for a case, usually without any request in advance by me. He always spends the time necessary to prepare for and complete a thorough analysis of the cases we are hearing. This preparation often includes a recommendation to me about how we can narrow the issues for hearing to those matters that will control the outcome. Jason is efficient in how he uses his time, and his work seldom requires much editing. He is a very careful and detailed writer. His analysis and logic are strong. In our discussions about cases, he has demonstrated the ability to understand the facts, respond intelligently to my questions and different points of view.

Jason has developed strong relationships with the other members of my chambers. He has worked closely with them and been willing to take on additional assignments when necessary to meet the requirements of the court. He has often taken time away from his own assignments to provide input or support for another law clerk who is working on a difficult issue. This willingness to support the other clerks has not affected his ability to timely complete his own assignments.

I highly recommend Jason. He has demonstrated good judgment and well supported the court in the challenging decisions facing the court. I am confident that Jason will meet any expectations and will provide the expertise needed to address the requirements of issues assigned to him. I would be happy to respond to any questions you may have.

Respectfully,

Clark Waddoups

June 26, 2023

Re: Jason Greene's Application for a Clerkship

To Whom It May Concern:

The purpose of this letter is to highly recommend Jason Greene for a clerkship position.

As to my qualifications and background to give this recommendation, I am an attorney that has practiced law for over 30 years. For the last 5 and a half years, I have been General Counsel for, and the corporate Secretary of, Holmes Homes, Inc., which is a large construction company with many affiliated companies. Prior to my employment with Holmes Homes, Inc., I was a shareholder of the law firm of Smith & Glauser, P.C. for approximately 22 years, which firm was an insurance defense firm that has now joined the national law firm Lewis Brisbois. Prior to then, I was a shareholder at another insurance defense firm, from which I and other attorneys broke-off to form Smith & Glauser, P.C. I have extensive litigation and trial experience.

I have known Jason Greene for nearly eight years based upon my extensive, professional working relationship with him. I first started working with Mr. Greene in 2015. At that time, I was retained by a large insurance company to represent Holmes Homes, Inc. and two of its subsidiaries (collectively, the "Holmes Companies"), in three separate lawsuits that had been brought against the Holmes Companies. At that time, I understand Jason Greene was a shareholder of the separate law firm of Anderson & Karrenberg, P.C., which firm was Holmes Homes, Inc.'s outside corporate counsel. Mr. Greene was one of the attorneys that Holmes Homes, Inc. retained to work with me on these three cases. From the summer of 2015 until I became General Counsel for Holmes Homes, Inc. in September of 2017, I was the lead attorney for these cases, and worked extensively with Mr. Greene. When I became General Counsel, and at my recommendation, the insurance company transferred the three cases to Mr. Greene and others at his firm. I continued to work extensively with Mr. Greene (until he took a clerkship position). Over time, Mr. Greene became the lead attorney for these three cases, which cases were litigated over many years.

These three cases referenced above were huge and extremely complex lawsuits, in which: the plaintiffs brought many contract and tort based claims against the Homes Companies seeking well over 40 million dollars in compensatory damages, (plus additional punitive damages), with a total exposure of approximately a half a billion dollars; the Holmes Companies were the target defendants; many cross-claims and third-party claims were also brought; and dozens of parties were involved. As an example, one of these cases involved: many contract and tort based claims against the Holmes Companies for over $30,000,000 in compensatory damages, (plus punitive damages); 278 residential townhomes; many cross-claims and third-party claims; dozens of parties; over 7 years of litigation at the trial court level; and a trial court docket with over 4,210 docket entries. The Holmes Companies prevailed at the trial court level on all three of these cases based upon dispositive motions filed by the Holmes Companies; and one of these cases has now been appealed by the plaintiff in that case. Among other things, Mr. Greene prepared voluminous filings in these cases, including (a) many motions for partial and/or complete summary judgment on behalf of the Holmes Companies and (b) responses to the many motions and other papers filed by other parties. I reviewed nearly all of the motions, memoranda and other papers filed with the courts in these cases, including all of the dispositive motions and memoranda. I attended all of the many dispositive motion hearings, wherein Mr. Greene provided oral argument on motions and papers filed by the Holmes Companies and other parties.

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In addition to these cases, I, (as General Counsel for the Holmes Homes, Inc.), continued to retain and use outside counsel for advice and legal services; and I routinely retained Mr. Greene to perform a wide variety of legal services relating to many different aspects of the law. I highly valued his advice and legal services.

Mr. Greene has an exceptionally keen intellect, the level of which few attorneys possess. His legal analytical skills and rigor of thought are extraordinary. He has a rare gift when it comes to his writing ability, and his writing is clear, succinct, logical and persuasive. His oral argument abilities are also noteworthy. He is an extremely hard worker, responsible and dedicated. The above referenced cases required extremely hard and dedicated work and involved many deadlines, all of which deadlines Mr. Greene met. Mr. Greene provided me drafts of motions, memoranda and other papers (to be filed with the court) well before their filing deadlines to enable me time to review them and provide input (if I so desired). Mr. Greene is of the highest character and integrity; and he has a wonderful and calm demeanor, even in light of improper assertions and/or argument by other attorneys. His candor, honesty, demeanor and mannerisms in communicating with others orally and in writing contribute to his credibility with others, including judges. I was deeply saddened when he more recently took a clerkship position, knowing I was losing such a superior advocate and exceptional outside counsel. If you hire Mr. Greene, he will truly be a great benefit to you in so many ways.

If you have any questions, please feel free to contact me at 801-572-6363.

Very truly yours,

Eric K. Davenport
General Counsel
Holmes Homes, Inc.

WRITING SAMPLE OF JASON GREENE – *C.R. ENGLAND*

Preface: The following pages are taken from a portion of a supplemental memorandum filed with the United States District Court for the District of Utah in a consumer class action relating to alleged fraud in the recruitment of independent contractor truck drivers. I was a member of a team of lawyers representing the class and was responsible for drafting the following excerpt.

The memorandum was filed after oral argument on a motion filed by the defendants that sought application of a Utah state statute requiring "opt-in" notice to class members in class actions asserting claims under a Utah consumer protection statute, rather than the "opt-out" notice required by Rule 23 of the Federal Rules of Civil Procedure. During oral argument, the court raised questions about the applicability of the Tenth Circuit's decision in *Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152 (10th Cir. 2017), which had been issued after the parties' primary briefing was filed. The memorandum, which was filed with leave of court, argued that language in *Racher* referring to an outcome-determinative test derived from *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny was not applicable because there was a direct conflict between Rule 23's opt-out notice requirement and the Utah statute. Because of the conflict, a different test applied under the federal Rules Enabling Act.

Ultimately, the district court agreed with the analysis set out in the following pages and denied the defendants' motion to require class members to opt-in to the class. The district court's decision can be found at *Roberts v. C.R. England, Inc.*, 321 F. Supp. 3d 1251 (D. Utah March 22, 2018).

A. The Supreme Court Has Developed *Two Separate Tests* for Determining Whether a State Law Applies in Federal Court: (1) the Outcome-Determinative Test, when *No* Federal Rule Applies; and (2) the Enabling Act Test, when a Federal Rule *Does* Apply.

1. The Development of the Outcome-Determinative Test under *Erie* and *Guaranty Trust*.

In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court famously held that the rules of decision in federal diversity cases are determined by state, rather than federal, law.[1] In *Erie,* the Court held that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state" and that "Congress has no power to declare *substantive* rules of common law applicable in a state . . . ." *Id*. at 78 (emphasis added). Although the majority opinion did not make any reference to federal procedural law, Justice Reed, in a concurring opinion, observed that "no one doubts federal power over procedure." *Id*. at 92 (Reed, J., concurring). Thus, *Erie* has been construed to create a dichotomy, requiring—in diversity cases—the application of state substantive law, while preserving federal power to regulate procedure. *See* 19 Fed. Prac. & Proc. Juris. § 4508 (3d ed.) ("For seven years it was supposed that Erie drew a line between 'substance' and 'procedure,' with the former governed by state law in diversity cases and the latter subject to federal law.").

Less than a decade later, it became apparent when applying the *Erie* test that drawing a line between substance and procedure proved quite difficult.[2] In *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 108 (1945), the Court, applying the *Erie* doctrine, stated:

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[1] For a helpful and more detailed discussion of the development of the *Erie* doctrine and its relationship to the federal rules, *see* 19 Charles Alan Wright, et al., *Federal Practice and Procedure: Jurisdiction and Related Matters* (hereinafter "Fed. Prac. & Proc. Juris.") §§ 4508-09 (3d ed. 2017).

[2] One commentator has suggested that at the time *Erie* was decided, the Court likely considered substance and procedure to be "mutually exclusive categories with easily ascertainable contents." *See* 19 Fed. Prac. & Proc. Juris. § 4508 (3d ed.)

> Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.

Despite the acknowledged difficulty in distinguishing between substance and procedure, the Court in *Guaranty Trust* attempted to formulate a test for determining when *Erie* required application of state law.[3] The Court stated that the intent of *Erie* was to ensure that in diversity cases, "the *outcome of the litigation* in the federal court *should be substantially the same* . . . as it would be if tried in a State court." *Id*. at 109 (emphasis added). *See also Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949) (citing *Guaranty Trust*, 326 U.S. 99) (state law must apply where "[o]therwise there is a different measure of the cause of action in one court than in the other, and the principle in Erie R. Co. v. Tompkins is transgressed."). And thus, the "outcome-determinative" test for evaluating when a state law applies in federal court was born.

In subsequent *Erie* decisions, the Supreme Court softened its strict application of *Guaranty Trust's* outcome-determinative test, explaining that when considering whether state or federal law should apply under *Erie*, "[t]he 'outcome determinative' test . . . cannot be read without reference to *the twin aims* of the Erie rule: discouragement of *forum-shopping* and avoidance of *inequitable administration* of the law." *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (emphasis added). Nevertheless, the outcome-determinative nature of the *Erie* test, as qualified by *Hanna*, persists in cases where no federal rule applies. *See, e.g.*, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426-31 & 437 n.22 (1996) (applying *Guaranty Trust's* outcome-determinative test, as qualified by *Hanna*, where there was *no conflict between state statute and federal rule*); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980) ("There is simply no reason why, *in the absence of a controlling federal rule*, an action based on state law which concededly would be barred in the

[3] Importantly, there was no federal rule at issue in *Guaranty Trust*.

state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants.") (emphasis added); *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1280 (10th Cir. 2011) ("*Because there is no federal rule providing a defendant with this same protection*, we must conclude that not applying [the state] statute would lead to forum shopping—a plaintiff will choose federal over state court to avoid providing a defendant with this option. . . . This result makes [the state statute] substantive.") (emphasis added).

2. The Development of the *Separate* Enabling Act Test under *Sibbach*, *Hanna*, and *Shady Grove*.

At the same time the Supreme Court was developing the *Erie* approach to determining when a state law should apply in federal court, a separate and distinct line of cases established a different test *in circumstances where a federal rule governs*. This unique precedent begins with *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), a decision issued just three years after *Erie*. *Sibbach* considered, for the first time, the validity of one of the Federal Rules of Civil Procedure under the Rules Enabling Act.[4] The plaintiff argued that Rule 35, which required submission to a physical examination by a court-appointed physician, was invalid under the Enabling Act because it abridged her substantive rights. *Id*. at 4-9. The Court rejected the plaintiff's argument, holding that because Rule 35 "really regulates procedure," it was applicable as a valid exercise of the Court's rule-making authority. *Id*. at 14. Notably (but understandably) absent from *Sibbach* was

[4] The Enabling Act provides in pertinent part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules *shall not abridge, enlarge or modify any substantive right*. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. § 2072 (emphasis added).